NATIONAL SOVEREIGNTY
AND
JUDICIAL AUTONOMY
IN THE
BRITISH COMMONWEALTH OF NATIONS

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"Civitas ea autem in libertate est posita, quae suis stat viribus, non ex alieno arbitrio pendet."

Livy.

"Universus hic mundus una civitas hominum recte existimatur."

Cicero (adapted).

PREFACE

THIS book touches justiciable disputes not only between individual litigants but also between the Dominions of the British Commonwealth of Nations *inter se*. Its object is to adumbrate the present provision for the ultimate hearing and determination of such disputes and to suggest, as much in the interest of the ordinary litigant, as in that of the Dominions and the Commonwealth as a whole, improvements and developments in accord with the trend of Commonwealth constitutional practice.

It does not pretend to be an exhaustive treatise, nor is it intended only for lawyers, as the subject is one of interest to many other persons. This, and also the exigencies of the argument, account for two matters as to which the author hopes for the indulgence of the technical reader. One is the occasional statement of some proposition with which the non-lawyer could not be expected to be familiar, and another is the reference more than once to an authoritative dictum because it is relevant to different aspects of the problem under consideration. For instance, the speeches in the Judicial Committee of the Privy Council in the leading case of *Hull v. M'Kenna* might possibly have been set out *in extenso* in an appendix, but the general principles there clearly enunciated affect so vitally different divisions of the argument of this work that it was found more logical to incorporate the relevant dicta in the text.

Acknowledgment has been made of the sources relied upon for the study here presented, but this is not possible with regard to friends, in various Dominions, who made valuable suggestions to me. This particularly applies to many important facts and opinions presented to me last autumn when I was one of the fortunate guests of the Bar of the Dominion of Canada and of the Bar of the United States of America in their respective countries. I take this opportunity of thanking them in a general way, but in particular I wish to express my appreciation of those friends there in the legal profession, many occupying judicial and other official positions, whose conversation was the seed from which this little work sprang.

It is right to add, however, that the inferences which I have drawn and the arguments I have built do not necessarily accord with those of the persons whose valuable information was placed at my disposal. I alone, therefore, am responsible for them and for the opinions expressed in this work, which was undertaken to show that the Judicial Committee can still serve in the British Empire as distinguished from the Commonwealth of Nations, the original purposes for which it was created by statute, without conflict with the judicial autonomy of the Dominions, and that the proposed Inter-Dominion Tribunal has an entirely separate function in the British Commonwealth of Nations.

I wish to express my thanks to Mr. Kevin Dixon, Barrister-at-Law, who kindly helped in the laborious work of checking the references and proofs.

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CHAPTER I

INTRODUCTION

GRAVE dissatisfaction exists to-day in some of the autonomous nations which are freely associated in the British Commonwealth of Nations as to certain functions of the Judicial Committee of the Privy Council. Amongst these functions are the hearing and determination of appeals from the courts in the British Empire, one of the purposes for which it was originally designed by its relevant statutes, and concerning which no question arises here. The dissatisfaction arises where it touches Dominion affairs, which it does by hearing appeals of ordinary litigants from the decisions of Dominion Supreme Courts and by hearing inter-Dominion disputes, either as a court of first instance or otherwise. It is important, therefore, in the interest of continued Commonwealth co-operation, to consider, in some detail, the source and nature of that dissatisfaction for the purpose of eliminating it by finding a remedy.

The Privy Council and its Judicial Committee existed before there was either a British Dominion or a British Commonwealth of Nations. Its jurisdiction, procedure and practice in that earlier period earned for it the profound respect of lawyers and litigants. The judgments of the distinguished and able lawyers, who in the past and present adorn its history, comprise the most authoritative expositions of British law in the British Empire.

The rise of the British Commonwealth of Nations, however, caused, to use a modern expression, a new orientation in the study and development of law. Each of the seven autonomous nations, equal in status, which are associated in the Commonwealth has full legislative and judicial

since rapidly built the superstructure of its own individual legal edifice. Each has its own internal Supreme Court well equipped by local and legal knowledge for the functions of a final appellate tribunal. One, the Irish Free State, has the distinction of being an elder nation newly restored to sovereignty, but with its earlier traditions and laws carefully preserved.

In these circumstances, objections have grown up on the part of the Dominions to having the judgments of their Supreme Courts reviewed and sometimes overridden and set aside by an extra-Dominion, though intra-Commonwealth, Court, even though it have the prestige and capacity of the Judicial Committee of the Privy Council. Its jurisdiction to do this has been, very naturally, questioned before itself in argument and even elsewhere by a refusal to follow its decisions.

To the translation of these objections into practice no real or reasoned opposition is apparent.

It has been argued by some that it provides some kind of safeguard for minorities, but this is, of course, entirely illusory as it could not prevent tyranny in any self-governing Dominion without resorting to armed force, which is not at its command. Its rights, as will be shown, being purely theoretical, and having no practical force in the Dominions, are more likely to divide than to unite the free nations of the Commonwealth. These nations have so many interests in common that matters in which to co-operate rather than questions upon which to disagree should be sought. It is obvious that the objections mentioned should be dealt with frankly and scientifically. Even the principle of the Imperial Conference, 1926, was carried no farther than a mere pious declaration which laid down that "it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected." [1] But this principle has never been implemented, although it had been

[1] Cmd. 2768 1926.

previously expressed by the learned and far-seeing Viscount Haldane in the Judicial Committee of the Privy Council, as far back as 1923, when he said "it is obviously proper that the Dominions should more and more dispose of their own cases . . . it becomes with the Dominions more and more or less and less as they please." [1] But although "several of the Dominions have shown unmistakably that they wish to reduce its power over their affairs to the absolute minimum" [2] the situation so created has not yet been adequately dealt with. It has been left to the Dominions to take definitive action themselves, as will be shown.

Lord Balfour pointed out that "law without loyalty cannot strengthen the bonds of Empire," and, thinking no doubt of the Commonwealth, he added significantly, "nor can we co-operate in handcuffs." [3] There are not wanting signs that the fleeting zephyr of self-determination, which in this regard inspired alike the learned Judicial Committee in 1923 and the Imperial Conference in 1926, may in course of time be followed by a stronger wind from the more vigorous and iconoclastic Dominions.

To preclude this exercise of the prerogative completely like the theory of the King's own omnipotence,[4] would be certain to reduce differences between the Dominions *inter se* and between them and the Privy Council by preventing its interference with ordinary Dominion litigation and larger issues.

But what is to be substituted for it?

The extension of national individuality seems to be the outstanding characteristic of the Dominions to-day, and any restraint, judicial or otherwise, upon that development would, obviously, tend to negative that amity and co-operation which, happily, are part of the gradually growing traditions of the Commonwealth of Nations.

How then, it must be asked, do these characteristics and

[1] *Per* Viscount Haldane in *Hull v. M'Kenna* (1926), I.R. at p. 404.
[2] *Per New Imperial Ideals* (1930), by Robert Stokes, with an introduction by the Right Hon. Lord Lloyd, P.C., G.C.S.I., etc., at p. 86.
[3] *Per South Africa* (1921), by Ian H. Hofmeyr

traditions bear upon the peculiar jurisdiction of the Judicial Committee of the Privy Council?

The problem may be considered in three aspects, namely, in its bearing, first, upon Dominion citizens, secondly, upon persons in the British Colonies and Dependencies, and, thirdly, upon inter-Dominion questions; and its solution depends upon the ability to reconcile the principles of Dominion autonomy with the practice of Commonwealth association.

Each aspect has an importance of its own and therefore merits examination in its relation to the two classes of citizens mentioned, on the one hand, and to the inter-Dominion questions, on the other.

Clarity requires it to be said that the steps which were recommended by the Imperial Conference of 1930 [1] towards the creation of a new type of Commonwealth representative institution would affect only the third aspect of the problem. It would leave untouched both classes of the ordinary litigant whose aim is to secure sure, speedy, inexpensive and conclusive justice. There is no reason, so far as the Dominion citizen is concerned, why this ordinary right of citizenship should not be his within his Dominion, *pari passu* with the larger Commonwealth evolution, the growth of which is so slow as to be inappreciable except to the student.

The problem is the removal of the existing dissatisfaction in the Dominions upon the subject of justiciable disputes and it is one which should be capable of scientific adjustment. It is unfortunate that this has not yet been done effectively notwithstanding frequent and not always constructive discussion at many Imperial Conferences and elsewhere.

Some of the features which emerge from a consideration of the three aspects mentioned help in the solution of the problem.

One is that the purposes for which the Judicial Committee was instituted by statute still exist—amongst which are, as already stated, appeals from Empire as distinct from Dominion Courts—and there is no reason why it should

not, without any conflict with the development or traditions of the Commonwealth, continue usefully to fulfil them.

A second is that if complete Dominion autonomy involves that no appeal should lie from any Dominion Supreme Court, every care should be taken to ensure the independence and competence of the Dominion Judiciary so as to safeguard against injustice not only the ordinary litigant but any vulnerable minority in any Dominion.

The third concerns possible inter-Dominion controversies and is that if the international tribunals at present available are considered inadequate and a Commonwealth Tribunal, which would not necessarily be a court of appeal, be desirable, then it should be a really common court, the constitution, procedure and practice of which should be agreed upon by all the Dominions.

On broad lines and in an introductory way, this seems to be the solution most in keeping with the constitutional practice of the seven autonomous nations which, united by a common allegiance to the Crown, are freely associated as members of the Commonwealth of Nations.

That constitutional practice, in its relation to the principle of Dominion autonomy and to the historical development of the Dominions, on the one hand, and of the Judicial Committee of the Privy Council, on the other, will be adumbrated in the following chapters. It will from this be evident that the judicial sovereignty of the Dominions, an essential element in their autonomy, is the logical outcome of the constitutional development of the nations freely associated in the Commonwealth.

CHAPTER II

THE SOVEREIGNTY OF THE DOMINIONS

§ 1. The Sovereignty of the Dominions.—§ 2. Their Judicial Sovereignty.—§ 3. Objections to the Jurisdiction of the Judicial Committee.—§ 4. Its Infringement of Dominion Sovereignty.—§ 5. Its Expense, Delay and General Unsuitability.—§ 6. Replies to these Objections: Sovereignty.—§ 7. Further Replies: Utilitarian.—§ 8. The Judicial Committee and Minorities.—§ 9. Objection to the Composition of the Court.—§ 10. The Imperial Conference and Abolition.

§ 1. The Sovereignty of the Dominions

The sovereignty of each of the self-governing nations [1] which form the British Commonwealth of Nations became a juridical fact of international law when it was declared by the Imperial Conference of 1926 [2] that

"they are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

Long before that declaration, they had already acquired the capacity to exercise all the rights of autonomy; indeed, that capacity had, *inter se*, been admitted by their Constitutions and otherwise, and in international affairs by their respective positions in the League of Nations and other

[1] The nations now forming the British Commonwealth of Nations are:
Great Britain and Northern Ireland.
Dominion of Canada.
The Commonwealth of Australia.
The Dominion of New Zealand.
The Union of South Africa.
The Irish Free State.
Newfoundland.

world activities. Their sovereignty, as a juridical fact, however, was recognised after this express declaration, not only in national constitutional law and practice, but also by most, if not all, the States which are subject to international law.

§ 2. Their Judicial Sovereignty

This sovereignty extended and extends, of course, to the appointment of judges. In each Dominion, the judges are appointed by the Governor-General solely on the advice of the Dominion Government, as provided in each of their respective constitutions. The judges' independence in office is secured by the specific application of the same principles as those obtaining in Great Britain, namely, that they shall only be removed from office by the Governor-General upon an address of both houses of the legislature and that their remuneration shall not be diminished during their continuance in office. All the Dominions thus possess their own courts, administering systems of law which vary greatly from each other, and in each there is a Supreme Court of Appeal of which the decision is final except in so far as there may be provision, by petition to the King or otherwise, for an appeal to the Royal prerogative of justice which is now, under statute, exercised by the King on the advice of the Judicial Committee of the Privy Council.

§ 3. Objections to the Jurisdiction of the Judicial Committee

The authority and jurisdiction of the Judicial Committee of the Privy Council to advise as to the exercise of this prerogative in relation to such autonomous Dominions, as distinct from colonies, dependencies and plantations, has been challenged and has formed the subject of discussion at Imperial Conferences in 1911, 1918, 1926, and 1930. Its right to hear and determine appeals from judgments of Dominion Courts was there raised as a question of constitutional principle.

Objections to such an appeal from Dominion Courts to

made on three main grounds: the first is constitutional; [1] the second may be called utilitarian,[2] and the third relates, from a Dominion viewpoint, to defects inherent in its composition.[2] These lines of objection and the replies to them, so far as there are replies, will be indicated briefly in this chapter and will be more fully considered in the following chapters.

§ 4. Its Infringement of Dominion Sovereignty

The constitutional objection is that any appeal from a Dominion Supreme Court to an extra-Dominion Court, such as the Judicial Committee of the Privy Council, is an infringement of the effective Sovereignty of that Dominion; that it is the exercise of a Royal prerogative which, having become merely theoretical, should no more be exercised than the prerogative of the King's omnipotence; and that it is repugnant to the autonomy of the seven nations which, equal in status, are in no way subordinate one to another in any aspect of their domestic (which, of course, includes judicial) or external affairs and, united by a common allegiance to the Crown, are freely associated as members of the British Commonwealth of Nations. As pointed out by a very recent English constitutional writer,

> "the Dominions regard the present Judicial Committee of the Privy Council with a profound but often grudging respect . . . it is to them essentially an English or United Kingdom institution. Several of the Dominions have shown unmistakably that they wish to reduce its power over their affairs to the absolute minimum. The expense and delay of bringing Australian appeals to it have often been felt, and some complaint is also made of the age of some of its members. It has not been free from criticism in Canada; South Africa limits appeals to it; and the Irish Free State has deliberately sought to reduce its influence." [3]

It will be shown later that this criticism, stringent though it be, ignores the fact that such appeals amount to a repugnant exercise of a merely theoretical prerogative which is

[1] See Chapter V *post*.
[2] See Chapter VIII *post*.
[3] Stokes, *New Imperial Ideals*, with an introduction by Lord Lloyd

the essential ground for criticism of the tribunal in this respect.

§ 5. Its Expense, Delay and General Unsuitability

The utilitarian objection is based on several specific and practical grounds, namely, that owing to their cost, such appeals give the rich an advantage over the poor suitor, whose right may be barred by expense; that the delay inseparable from appeals to successive tribunals tends to defeat justice; that they amount to an implied aspersion upon the ability or integrity of Dominion Appeal Courts;[1] that the Privy Council's detachment from,[2] or defective knowledge of, local Dominion conditions makes adequate consideration of a case impossible or too expensive; that this also reduces the usefulness and increases the expense of counsel conducting the appeal, whether they are from the Dominion concerned or not; and that where the issue is one between a Dominion and the British Government or between a Dominion person or firm and a British person or firm possible partiality is not entirely negatived.

§ 6. Replies to these Objections: Sovereignty

The replies which have been made to the constitutional objection have been various and inconclusive and, though this aspect of the matter will be dealt with in some detail later,[3] attention may be drawn in passing to Professor Berriedale Keith's opinion which accords in this respect with the views of the Governments of the Union of South Africa and the Irish Free State, that such appeals are an infringement of Dominion Sovereignty, but which differs from that of certain other distinguished authorities who take a contrary view. On the one hand, there is Professor Berriedale Keith's dictum that

[1] Keith, *Dominion Autonomy in Practice*, p. 46.

[2] A similar objection has been made to Scottish appeals to the House of Lords by a recent writer who says, "practically the House of Lords as a Supreme Court for Scotland has worked extreme hardship on litigants and has given the law of Scotland a bias quite foreign to its own genius,"

" it is obviously absurd to declare that Canada is autonomous and an equal member of the Commonwealth of Nations and at the same time hold that the Courts of the Dominions are unfit to do justice to an unfortunate lady who has an accident whilst seeking to enter a Canadian Railway station, to take one of the issues recently decided by the Privy Council overruling the Dominion Courts." [1]

Declarations on behalf of the Government of the Union of South Africa by General Hertzog and other statesmen express a similar view. The Minister for External Affairs of the Irish Free State, Mr. McGilligan, in a broadcast message from London to America, during the sitting of the Imperial Conference, on the 9th November 1930, speaking of Privy Council Appeals said, " you will be glad to hear that we in Ireland have no intention whatever of allowing this infringement of our sovereignty to continue." Antagonism to such appeals had earlier been expressed by other Irish Ministers including Mr. Blythe, the Minister for Finance, and the late Mr. Kevin O'Higgins, who represented the Irish Free State at the Imperial Conference in 1926. On the other hand, Dr. Manfred Nathan, K.C., the distinguished South African commentator, says : [2]

" It does not, however, seem to follow that the existence of the Judicial Committee constitutes a derogation from the autonomy of the Dominions. The Judicial Committee is a court of appeal for the Empire or Commonwealth of Nations as a whole, as distinguished from Great Britain, with regard to whose courts it does not sit in appeal, except in certain cases which are relics of the ancient jurisdiction of the Privy Council—namely, Admiralty appeals and appeals from the Ecclesiastical Courts. In so far as the Judicial Committee is a court of appeal for English cases, this places the Dominion courts on a level of equality with the English courts, from which an appeal lies to the same tribunal. The appeal to the Judicial Committee no more renders the Dominion Courts ' unfit to do justice ' than the appeal from the English Court of Appeal to the House of Lords Court renders the Court of Appeal ' unfit.' The Judicial Committee, in other words, is simply the final court of resort for the whole Empire, and in this respect the courts from which appeals lie all stand on an equal footing. It is, however, true

[1] In an article in *The Outlook*, 5th February 1927.
[2] In *Empire Government*, p. 56.

that the Judicial Committee is constituted and regulated by Acts of the Imperial Parliament. The reason for this, however, is purely historical, and this fact no more interferes with self-government in the Dominions than does the fact that the succession to the Crown, which is the Head of each Dominion, is regulated by an Act of the Imperial Parliament." [1]

The Hon. J. G. Latham, K.C., Attorney-General of the Commonwealth of Australia, recently pointed out that while this question was, in Australia, the subject of vigorous controversy at an earlier period, there is "at the present time no indication of any particular public opinion on the matter," [2] but mentions significantly that the Australian High Court did not treat the decisions in certain matters of the Judicial Committee of the Privy Council as authoritative and binding. For instance, the ruling of the Privy Council, in the important case of *Webb v. Outrim*,[3] that the Commonwealth of Australia Constitution Act [4] did not authorise the Commonwealth Parliament to take away the right of appeal to the King in Council, was not followed by the Australian High Court.

§ 7. Further Replies: Utilitarian

The replies to the utilitarian objections have not been adequate. Various attempts have been made, however, to relegate them to a comparative unimportance by presenting by way of reply some important but different considerations in favour of retention of the present system. It has been urged that

"its merits are . . . undeniable. In the vexed issues of Provincial rights, especially as regards education and language in Canada, it has played the part of an impartial authority,

[1] The force of this argument is weakened by the recommendation of the Imperial Conference, 1930, "that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom" (Cmd. 3717).

[2] *Australia and the British Commonwealth* (1929), pp. 116, 117.

[3] *Webb v. Outrim* (1907), A.C. 81.

[4] 63 & 64 Vic. c. 12; *cf. Baxter's Case* (4 C.L.R. 1087); *The Engineer's Case* (28 C.L.R. 139); *The Limerick Case* (35 C.L.R. 69); *Pirrie v. MacFarlane* (36 C.L.R. 171); *The Commonwealth of Australia v. Kreglinger and Others* (37 C.L.R. 393), there referred to.

unswayed by political consideration ; it helped to secure uniform interpretation of so much of the Common Law as remains untouched by Dominion reforming zeal and of statute law adopted in similar terms in diverse parts of the Empire, such as legislation on marine insurance and negotiable instruments. It possesses the highest authority on the prerogative of the Crown and it upholds the supremacy of Imperial legislation over Dominion enactments." [1]

§ 8. The Judicial Committee and Minorities

The more important point in its favour has been made that it operates to protect minorities and this point is made with some force on behalf of the French Catholics of Quebec and the Irish Protestants in the Irish Free State.

" In Canada, Quebec considers the final voice of the Privy Council as the best safeguard for her Provincial rights, her language and her religion. It may seem that autonomy is inconsistent with compulsory appeals, but this is not so if it is remembered that the appeal to the Privy Council is considered necessary for the protection of the rights won by minorities in certain Dominions ; and it is a right, not imposed by the Imperial Parliament, but desired by the Dominions." [2]

In the Irish Free State the same point has been made on behalf of the Protestants who form a minority there. During the Imperial Conference of 1930 the Primate of the Church of Ireland and the Archbishop of Dublin jointly protested against the abolition of such appeals. Their protest took the form of vigorous objection to any proposal that Great Britain should consent to any limitation of the constitutional rights granted by the Irish Treaty of 1921, and secured by the Constitution of the Irish Free State. The particular safeguard in question was contained in the proviso to Article 66 which " provided that nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave." The protest put the position of the minority in the following way :

[1] Keith, *Dominion Autonomy in Practice*, p. 46.
[2] Schlosberg, *The King's Republics*, p. 116.

"We do not impute to the present government of the Irish Free State any desire to invade our rights either of property or religious liberty, but the present government will not always be in office, and Ireland is a country in which religious distinctions and prejudices exercise a dominating influence of a kind of which those not living in Ireland can have little or no experience. The position of the minority, a minority viewed with jealous hostility by elements of the population far from negligible, needs, therefore, the protection of such a safeguard for its fundamental treaty rights as is provided by the portion of Article 66 which we have quoted.

"The minority in the Irish Free State have loyally accepted the new order of things in Ireland; but we would remind you that memories in Ireland are long and that the removal from the Constitution of the safeguard referred to, or the consent of Great Britain to its exercise only with the consent of the Supreme Court in Ireland (as has been suggested), or any similar abrogation or limitation, while it may gratify the desire of Irishmen for independence, will inevitably weaken the security enjoyed by the members of a vulnerable minority, and as time passes lead most certainly to infringements of their liberty which they would be powerless to withstand." [1]

§ 9. Objection to the Composition of the Court

The third objection is that even if a Commonwealth Court is necessary there are defects inherent in the Judicial Committee which render it unsuitable as a final court of appeal for a Commonwealth of freely associated Nations who did not create it and do not control its law, practice, procedure, or composition. Efforts have been made to reform it, but it still remains unsuited to the needs of the Commonwealth of to-day.

These very briefly are the three objections to such appeals and the replies to them.

§ 10. The Imperial Conference and Abolition

The advisability of abolishing or restricting such appeals was raised and discussed at the Imperial Conference of 1926, but the delicate questions of principle and expediency involved were not determined.

[1] This point is dealt with in Chapter VIII *post.*

"From the discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting Judicial Appeals should be determined otherwise than in accordance with the wishes of the part of the Empire, primarily affected." [1]

Sir Robert Borden interpreted this to mean that "questions affecting Judicial appeals are to be determined in accordance with the wishes of the Dominions primarily affected." [2] This right of appeal was, however, not then, nor since, abolished. The Conference merely expressed the somewhat vague, and, because not mentioning the Dominions, not clearly relevant view that where changes in the existing system were proposed which, while primarily affecting "one part of the Empire" raised issues in which other parts were also concerned, such changes ought only to be carried after consultation and discussion.

There the matter was left except that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the particular case of the Irish Free State.[3]

The matter developed, so far as the Irish Free State was concerned, a little further, in an unexpected way, before the next Imperial Conference by means of applications for leave to appeal to the Judicial Committee by some dissatisfied litigants [4] and by legislation declaratory of and amending the law in that Dominion. This legislation, which was adversely criticised, as being *ex post facto* legislation, is dealt with in some detail later,[5] in its proper place, where the facts on examination negative this criticism. It may, however, be observed here in passing, that the enactment of *ex post facto* legislation, whether as a gesture of national independence of an external, though intra-Commonwealth,

[1] The Report of the Inter-Imperial Relations Committee of the Imperial Conference, 1926 (Cmd. 2768, 1926).

[2] Journal of the R.I.I.A., July 1927, p. 205; *per* Baker on *The Present Juridical Status of the British Dominions in International Law*, at pp. 231–2.

[3] Cmd. 2768, 1926.

[4] *Wigg and Cochrane v. The Attorney-General* (1927), I.R. 285; *Lynham v. Butler* (1925), 2 I.R. 231; *Bray Urban District Council v. Performing Right Society* (1930), I.R. 509.

[5] Chapter VII *post*.

Court, or otherwise, would be calculated to dissatisfy litigants and to discredit the administration of justice.

The question of appeals was, however, left in a very unsatisfactory and unfinished condition by the Imperial Conference, 1926, where, although "it was not pressed," [1] it was strongly argued [2] that they amounted to an infringement of Dominion Sovereignty. As contemplated by that Imperial Conference the matter was brought up again at later Conferences,[3] particularly at the Imperial Conference of 1930, with results which are discussed in Chapter X. In order, however, to appreciate the difficulty of the problem involved in the conflict between the exercise of the Royal prerogative of justice through the Statutory channel of the Judicial Committee, and the present autonomy of the Dominions, it is necessary to consider in greater detail its history, development and potentialities. This is done in the following chapters.

[1] Cmd. 2768, 1926. [2] By Mr. Kevin O'Higgins.
[3] *Cf.* the Report of the Conference on the Operation of Dominion Legislation, 1929 (Cmd. 3479), and the Report of the Imperial Conference, 1930 (Cmd. 3717).

CHAPTER III

THE NATURE AND PRINCIPLES OF THE JUDICIAL COMMITTEE

§ 11. The Privy Council.—§ 12. Its Origin.—§ 13. Its Early Jurisdiction.—§ 14. The Judicial Committee of the Privy Council.—§ 15. The Composition of the Judicial Committee.—§ 16. The Jurisdiction of the Judicial Committee.—§ 17. To grant Special Leave to Appeal.—§ 18. To hear Appeals brought as of Right.—§ 19. Its Peculiar Procedure.—§ 20. Its General Principles.—§ 21. The Wishes of the Dominions.—§ 22. Restrictions on its Jurisdiction.

§ 11. The Privy Council

The Privy Council was not scientifically created or instituted for the purpose which it now fulfils. It grew, like many other English institutions, into a sphere of usefulness for which it was and is in many respects admirably suited. Part of that sphere has, however, outgrown it in such a way as to render a certain statutory jurisdiction which was conferred on its Judicial Committee no longer appropriate. While its application to the British Empire, which application will be indicated more particularly later, remained the same as before, the evolution of that new conception, the British Commonwealth of Nations, introduced new elements limiting its jurisdiction where that jurisdiction conflicted with their sovereignty.

§ 12. Its Origin

A brief glance at some of the relevant aspects of the origin and history of the Judicial Committee of the Privy Council will help to clear the ground for an adequate estimate of its present position and jurisdiction in regard to the autonomous nations freely associated as members of the British Commonwealth of Nations. The Privy Council came into

existence in that adolescent period of British history when the British Empire was, as yet, in the making and long before either of the distinctively modern ideas of British Dominion or British Commonwealth of Nations had been evolved.

§ 13. Its Early Jurisdiction

Its jurisdiction arose from the common law and the prerogative of the King, as the fountain of justice, to hear and determine the petitions and complaints of his subjects. Most of this jurisdiction has been transferred to the ordinary courts of law, but an appeal to the King in Council still lies in certain cases as of right [1] and in certain other cases by special leave.[2] The steps by which this was effected can be indicated shortly.

The feudal English kings early adopted the idea of devolution in their administration. The Curia Regis by the time of Henry II had become a [3] permanent board of expert judges and lawyers from which sprang the Courts of Exchequer, Common Pleas, King's Bench, and so on, dealing with the judicial business of the kingdom. In the King remained vested his prerogative, which has been defined by a learned constitutional writer as "the residue of discretionary or arbitrary authority which at any given time is legally left in the hands of the Crown." [4] The same process of devolution continued in the course of time and the Royal prerogative was to a large extent dealt with in the King's name by the periodic meetings of the "Great Council" of his tenants-in-chief, which council, summoned by writs under the Privy Seal, was held in secret, *Concilium Secretum*, and later became known as the Privy Council, its present name.

§ 14. The Judicial Committee of the Privy Council

The judicial jurisdiction of the Privy Council remained comparatively vague and expansive until the nineteenth

[1] This is dealt more fully at § 18 *post*.
[2] *Ib.*, § 17 *post*.
[3] Hall's *Constitutional History*, p. 55.
[4] *Per* Lord Dunedin in *Attorney-General v. De Keyser's Royal Hotel, Ltd.* (1920), A.C. at p. 526.

century when by statute it was defined, and the Judicial Committee of the Privy Council was constituted a Court with a consequent differentiation of its judicial from its other functions. This change, the statutory steps in which will be indicated below, from a prerogative to a statutory jurisdiction is important,[1] because of the limitations it imposes.

" Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which, before the Act, could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act to the prerogative being curtailed." [2]

" Those powers which the executive exercises without Parliamentary authority are comprised under the comprehensive term of the prerogative. Where, however, Parliament has intervened and has provided by statute for powers previously within the prerogative being exercised in a particular manner and subject to the limitations and provisions contained in the Statute they can only be so exercised. Otherwise what use would there be in imposing limitations if the Crown could at its pleasure disregard them and fall back on the prerogative? . . . Where a matter within the prerogative is provided for by Statute the prerogative is merged in the Statute." [3]

" The general rule as expressed in Bacon's Abridgement (7th. ed. at p. 462) is that where an Act of Parliament is made for the public good, the advancement of religion and justice and to prevent injury and wrong, the King shall be bound by such Act, though not particularly named therein." [4]

The Judicial Committee of the Privy Council is therefore a statutory creation with a well-defined jurisdiction designed to hear and determine appeals from courts in the British Empire, but such courts, it will be submitted in this work, are subject to considerations different from those in the Dominions comprising the British Commonwealth of Nations, all of whose rights to complete self-government were con-

[1] Keith, *Sovereignty of British Dominions*, p. 225.

[2] *Per* Lord Dunedin in *Attorney-General v. De Keyser's Royal Hotel, Ltd.* (1920), A.C. at p. 526.

[3] *Per* Swinfen Eady, M.R., in the *Attorney-General v. De Keyser's Royal Hotel, Ltd.* (1919), 2 Ch. at 216; also (1920) A.C. 508.

[4] *Per* Sir George Jessel, M.R., in *ex parte Postmaster-General in re Bonham* (1879), 10 Ch. D. at p. 601.

ceded since the Judicial Committee was so constituted. Before distinguishing these it is as well to adumbrate the statutory steps by which the Judicial Committee of the Privy Council has developed to its present position.

§ 15. The Composition of the Judicial Committee

By the Judicial Committee Act, 1833,[1] the Judicial Committee of the Privy Council was constituted, but its original constitution has been altered and extended by later statutes. It consists of

"the President of the Council, the Lord Keeper or first Lord Commissioner of the Great Seal of England, and all Privy Councillors who have held these offices, or hold or have held high judicial office, that is to say who have been Lords of Appeal in ordinary, judges of the Supreme Courts of England or Ireland, or of the Court of Session in Scotland. The Sovereign may also by sign manual appoint two other privy councillors to be members of the committee. Privy Councillors who are or have been judges of the Supreme Court of the Dominion of Canada, or of a superior court in any of the provinces of the Dominion, or of New South Wales, New Zealand, Queensland, South Australia, Tasmania, Victoria, Western Australia, the Cape of Good Hope or Natal, or of any other British possession fixed by Order in Council, or chief justice or justices of the High Court of Australia, or chief justice or judges of the Supreme Court of Newfoundland, or judges of a superior court of the Transvaal or of the Orange River Colony, are also members of the Judicial Committee.

"Any member of the Privy Council, being or having been chief justice or a judge of any High Court in British India, can by direction of His Majesty be made a member of the Judicial Committee, but there must not be more than two such members at the same time." [2]

A person who is or has been a judge of the court appealed from or of any court to which an appeal lies from that Court may be appointed as assessor on the hearing of such an appeal. The constitution of this appellate tribunal was thus confined to persons who had held judicial office or had at least a legal training and the provisions as to Colonial Judges were apparently intended to give it a more representative character.

[1] 3 & 4 William IV, c. 41.
[2] Halsbury's *Laws of England*, Vol. 9, pp. 27, 28.

§ 16. The Jurisdiction of the Judicial Committee

It was enacted by the Act of 1833 that all appeals or complaints in the nature of appeals whatever, which, either by virtue of that Act, or of any law, statute or custom might be brought before the King in Council from or in respect of the determination, sentence, rule or order of any court, judge or judicial officer, and all such appeals as were then pending and unheard and also any other matters His Majesty should think fit, should be referred to the Judicial Committee to report thereon.

By the Judicial Committee Act, 1844,[1] the jurisdiction and powers of that tribunal were extended to provide for the admission of appeals from any court in any colony although such court should not be a court of appeal.

Various later statutes and Orders in Council have regulated the development and the procedure and practice of the Judicial Committee but they are not relevant here. Suffice it to say, in passing, that the appeal to the Judicial Committee is itself of two kinds—by special leave and as of right [2]—and between these there is an essential difference.

§ 17. To Grant Special Leave to Appeal

The manner in which the jurisdiction of the Judicial Committee to grant special leave to appeal is exercised is a consequence of the theory on which it is based, that it is in effect exercising the Royal prerogative of justice delegated to it. This is a right of the sovereign and not of the subject and is an appeal to the Royal discretion [3]; it is, therefore, exercised by the Judicial Committee on that basis in the form of advice to His Majesty. The procedure is by petition for special leave to appeal and there are specific grounds upon which such leave will be granted or refused. The person wishing to appeal to the prerogative must bring himself within these on his application for leave to appeal. The considerations guiding the Judicial Committee in advising the King to grant such leave vary according to the locality of the

[1] 7 & 8 Vic. c. 69.
[2] The question of " special reference " is peculiar and is considered later.
[3] *Falklands Islands Company v. The Queen*, 1 Moo., P.C. 299.

Court of which the decision is in question, but conform to the general principle that the case must involve matters of great public interest, or affect a large number of people, or raise important points of law or questions of constitutional interest, and not such issues as can be best determined by the local courts. Unless the person seeking to appeal establishes that the case is thus exceptional in some way, leave will not be granted and the appeal will not be heard. Thus, appeal by special leave involves the preliminary decision of whether the case is sufficiently important to justify its being heard. The right to grant leave to appeal, though a prerogative right, can be renounced by the Crown by legislative enactment, in which, of course, the Crown participates.[1] For this purpose the mere provision that the decision of the local court is to be " final and conclusive " has been held insufficient,[2] express words limiting or abolishing the prerogative being required.[3] When so limited or abolished, the Judicial Committee can no longer grant special leave to appeal. In addition to the direct grant by this body of leave to appeal many of the local courts have a delegated power also to grant leave, and in exercising this power they are guided by similar considerations to those influencing the Judicial Committee. Where such a court, having power to grant leave refuses it, the subject may still, in absence of any restrictive provision, petition the King in Council for special leave.

§ 18. To Hear Appeals brought as of Right

The appeal as of right is a right of the subject depending upon a grant by the Sovereign of the right to appeal which may be given by means only of the royal prerogative expressed either in an Order in Council or in a statute. Where a grant has been made, and so long as it continues unrevoked, the subject possesses the right of appealing without obtaining special leave. He has not to show that the case involves any specially important matters but merely that it comes

[1] *In re Marois*, 15 Moo. at p. 193.
[2] *Canadian Pacific Railway Co. v. Toronto Corporation* (1911), A.C. 461.
[3] *Woolley v. Attorney-General of Victoria*, 2 App. Cas. 163.

within the class of cases in which the right of appeal has been granted. In this class of case an appeal may be taken irrespective of the importance of the subject-matter or the questions involved. Usually, however, appeal as of right is limited, by the particular Order or an enactment, to matters involving property over a certain value or questions of a certain type or degree of importance. In certain cases an appeal lies as of right to the Judicial Committee from the inferior courts of a part of the British Empire, without the necessity of first appealing to the higher courts; and under the Judicial Committee Act, 1844,[1] special leave may be granted by the Judicial Committee to appeal direct from inferior courts, but this is rarely done.

§ 19. Its Peculiar Procedure

The origin and history of the Judicial Committee afford reason for the peculiar nature of the proceedings before it from the petition for leave to appeal to the determination of the issues which takes the form not of a judgment but of a report to His Majesty delivered in open court giving the reasons for the decision and ultimately embodied not in a decree but in an Order in Council. In fact, the Judicial Committee is a court of law, with a great and important jurisdiction, composed of distinguished judges, who decide the legal questions before them on the established principles of law; in form, it is an advisory committee of the King's Privy Council advising on questions which are, in effect, referred to it by His Majesty as the supreme source of justice. The decision, in fact judicial, takes the form of advice to his Majesty as to executive action over which he has no more than merely theoretical control, if even that, in the Dominions since their autonomy was declared.

§ 20. Its General Principles

This being so it is obvious that a new situation has been created by that declaration and this seems to have been present to the mind of the learned Viscount Haldane when

[1] 7 & 8 Vic. c. 69.

in the Judicial Committee of the Privy Council before the first appeal from the Irish Free State was opened he in discussing the general principles applicable said,

" the Sovereign retains the ancient prerogative of being the supreme tribunal of justice; I need not observe that the growth of the Empire and the growth particularly of the Dominions, has led to a very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee. It is obviously proper that the Dominions should more and more dispose of their own cases, and in criminal cases it has been laid down so strictly that it is only in most exceptional cases that the Sovereign is advised to intervene. In other cases the practice which has grown up, or the unwritten usage which has grown up, is that the Judicial Committee is to look closely into the nature of the case, and, if, in their Lordships' opinion, the question is one that can best be determined on the spot, then the Sovereign is not, as a rule, advised to intervene, nor is he advised to intervene normally—I am not laying down precise rules now, but am laying down the general principles—unless the case is one involving some great principle or is of some very wide public interest." [1]

From the standpoint of an autonomous nation, freely associated with others, united by a common allegiance to the Crown, this declaration of the Judicial Committee marked an advance but not, with respect, a sufficient realisation of the facts of the period. Even though the Sovereign in theory retain the ancient prerogative of being the supreme tribunal of justice in each Dominion, it seems clear that for the Sovereign, by himself or on the advice of the Judicial Committee of his Privy Council, to attempt to administer it in fact in any Dominion would surely be repugnant to his declaration of that Dominion's full autonomy, including a Supreme Court of its own. By the concession of complete autonomy, to adopt the words of Lord Dunedin, " the Crown assents . . . to the prerogative being curtailed," [2] and, in fact, Viscount Haldane also declared that " the growth of the Dominions has, however, led to a very substantial restriction of the exercise of the prerogative." [3] It is certain

[1] *Hull v. M'Kenna* (1926), I.R. 402.
[2] *Attorney-General v. De Keyser's Royal Hotel, Ltd.* (1920), A.C. at 526.
[3] *Hull v. M'Kenna* (1926), I.R. at p. 404.

that the learned Viscount Haldane recognised different degrees of Dominion autonomy in this matter, for he draws a distinction between unitary and non-unitary Dominions.

"It is also necessary," he says, "to keep a certain discretion, because when you are dealing with the Dominions you find that they differ very much. For instance, in States that are not unitary States—that is to say, States within themselves—questions may arise between the central Government and the State, which, when an appeal is admitted, give rise very readily to questions which are apparently very small, but which may involve serious considerations, and there leave to appeal is given rather freely. In Canada there are a number of cases in which leave to appeal is granted because Canada is not a unitary State, and because it is the desire of Canada itself that the Sovereign should retain the power of exercising his prerogative: but that does not apply to internal disputes not concerned with constitutional questions, but relating to matters of fact. There the rule against giving leave to appeal from the Supreme Court of Canada is strictly observed where no great constitutional question, or question of law, emerges. In the case of South Africa, which is a unitary State, counsel will observe that the practice has become very strict. We are not at all disposed to advise the Sovereign unless there is some exceptional question, such as the magnitude of the question of law involved, or it is a question of public interest in the Dominion to give leave to appeal. It is obvious that the Dominions may differ in a certain sense among themselves. For instance, in India leave to appeal is more freely given than elsewhere, but the genesis of that is the requirements of India, and the desire of the people of India. In South Africa, we take the general sense of that Dominion into account, and restrict the cases in which we advise His Majesty to give leave to appeal. It becomes with the Dominions more and more or less and less as they please." [1]

§ 21. The Wishes of the Dominions

It is conceivable that the far-seeing Viscount Haldane may have visualised, side by side with a merely theoretical prerogative, the abandonment of its exercise in this respect by gradual stages "more and more or less and less as they please" until the repugnancy disappeared, for he not only says that "it is obviously proper that the Dominions should more and more dispose of their own cases," but dealing specifically

[1] *Hull v. M'Kenna* (1926), I.R. at p. 405.

with the case of the Irish Free State the first appeal from whose Supreme Court was then before him, he added:

"From what I have said, it is obvious that it is not expedient that we should lay down too rigidly, to begin with, what the principles are. It will grow with the unwritten constitution. You have got a constitution in Ireland which is partly written, but our experience is that all unwritten constitutions develop flesh and blood within the unwritten bones; and we have to see the sort of flesh and blood you put on as regards the question of how much you dispose completely of your own judicial questions . . . the appeal to the Privy Council is not as of right; it is an appeal to the King's discretion, and it is founded on a petition that he should exercise his discretion. Well, obviously, what is a matter of discretion is a very different thing from what is a matter of right; and, accordingly, when you come from a new Dominion, with full Dominion Status, like the Irish Free State, it is not by any means as of course, even to begin with, that leave to appeal will be given. On the contrary, the Sovereign may be advised to apply the general principle of restriction to which I have alluded." [1]

"One must remember in dealing with what is Dominion Status, we are dealing with nothing which you can find any definition of in any law book—there cannot be—it is a question really of constitutional practice. By the strict legal theory of this constitution of the Empire, the King is omnipotent; but there has grown up a restriction of a constitutional kind through Parliaments and through the necessities of responsible representative governments, which strictly limits the power of the King; but you will not find the limitations by searching books; you will not find this laid down in the form of an abstract legal proposition of Statute law, or common law; they are just as real, but they are constitutional limitations." [2]

§ 22. Restrictions on its Jurisdiction

On these general principles it seems clear that the declaration by the Sovereign of the complete autonomy of any Dominion amounts to a complete restraint on the exercise of his prerogative in that Dominion.

Further, it seems clear that, upon any such declaration by the Sovereign, a saving clause would be necessary to preserve even the theory of the prerogative. "In Ireland, under the Constitution Act, by Article 66, the prerogative

[1] *Hull v. M'Kenna* (1926), I.R. at p. 405. [2] *Ibid.*, 408.

is saved, and the prerogative therefore exists in Ireland just as it does in Canada, South Africa, India, and right through the Empire with the single exception that I have mentioned —that it is modified in the case of the Commonwealth of Australia in reference to, but only in reference to, constitutional disputes in Australia." [1]

On the general principles already quoted the question of the assertion of this theoretical prerogative, so saved, is one of constitutional practice. The practice upon this principle would appear to be that where a unitary Dominion develops flesh and blood which enables it to " dispose completely " of its own judicial questions and desires to do so " it is obviously proper " [2] that it should do so and that its own Supreme Court should be supreme. The criteria governing the admission of such appeals appear to be (*a*) is the particular Dominion unitary? (*b*) has it a complete judicial system enabling it to dispose fully of its own cases? and (*c*) does it desire to do so? In cases where there is an affirmative compliance with these, the assertion in practice of the theoretical Royal prerogative would be as repugnant as the assertion of the theoretical Royal omnipotence, to which Viscount Haldane referred. It would be equally repugnant to the sovereignty which each of the freely associated nations claims for itself and concedes to its brother nations in the Commonwealth.

Indeed, one of the great authorities on the subject of the British Constitution has declared that " the Imperial Government is now ready at the wish of a Dominion to exclude from its constitution, either partially or wholly, the right of appeal from the decision of the Supreme Court of such Dominion to the Privy Council." [3]

Notwithstanding all this it is strange to observe that this prerogative has been since invoked in disregard of these principles with results which will be dealt with in the following chapters.

[1] *Hull v. M'Kenna* (1926), p. 404. [2] *Ibid.*, at 404.

[3] Dicey on *The Law of the Constitution*, at p. xxxi, 8th ed., published in 1927. *Cf.* Commonwealth of Australia Constitution Act, 1900 (63 & 64 Vic. c. 12), s. 74; South Africa Act, 1909 (9 Ed. VII, c. 9), s. 106.

CHAPTER IV

THE RIGHTS AND WISHES OF THE DOMINIONS

§ 23. The Juridical Rights of the Dominions.—§ 24. Non-unitary Constitutions.—§ 25. Unitary Constitutions.—§ 26. Canada.—§ 27. Australia.—§ 28. New Zealand.—§ 29. The Union of South Africa.—§ 30. The Irish Free State.—§ 31. Dominions tend against Appeals to the Judicial Committee.—§ 32. Dominion Sentiment against Appeals to Judicial Committee.—§ 33. The Conflict between the Dominions and the Judicial Committee.

§ 23. The Juridical Rights of the Dominions

The last chapter has summarised the origin, nature and principles of the Judical Committee of the Privy Council in regard to appeals from the Dominions and it is evident that the autonomous rights of the Dominions and also their wishes are relevant factors. It will be important, therefore, to indicate now briefly the juridical position in this respect of the Dominions themselves in the British Commonwealth of Nations and their wishes with regard to judicial sovereignty and later their efforts to preserve it.

This, apparently simple, enquiry involves an examination not only of the constitutional statutes, but also of the constitutional practice and development of each Dominion to see how far " there has grown up " in each, again to use the words of the learned Viscount Haldane, " a restriction of a constitutional kind through Parliaments and through the necessities of responsible representative governments, which strictly limits the power of the King," limitations, he added, which though they are not to be found in books, or laid down in the form of an abstract legal proposition of statute law or common law, are just as real but they are constitutional limitations.[1] This insistence upon the

[1] *Hull v. M'Kenna* (1926), I.R. at p. 408.

unwritten Dominion constitutions developing side by side with the written constitutions until each Dominion disposed completely of its own judicial questions, clearly contemplated the inclusion of the prerogative to hear and determine appeals in the same category as the theory of the King's omnipotence. The test laid down was "how much you dispose completely of your own judicial questions," [1] or in other words, how much each Dominion by the development of its own sovereignty restricts the exercise of the theoretical Royal prerogative to hear and determine appeals.

The application of these principles provides a very apt and very interesting example of the elasticity of the constitutional relations of the autonomous nations which, united by a common allegiance to the Crown, are freely associated as members of the British Commonwealth of Nations.

In all the Dominions the position as to appeals to the Judicial Committee of the Privy Council is regulated by statute, either the Dominion constitution or a Dominion statute. In all, the prerogative right of the King in Council to grant leave to appeal exists, but in Australia this is limited in respect of constitutional disputes. In some, an appeal as of right also exists in certain matters; in others it does not, as will be indicated below. The broad principles applicable depend on the nature of the Dominion—whether unitary or federal—the development of its judicial system and the wishes of its government.

§ 24. Non-unitary Constitutions

The difference between unitary and non-unitary constitutions has been already referred to as important. In non-unitary states the whole system of government depends on a balance between the powers of the central or federal government, and those of the provincial or state governments. The whole field of government is divided between the central and local authorities so as to preserve the independence of the latter while achieving, through the former, a certain unity in important matters. This division of

[1] *Hull v. M'Kenna* (1926), I.R. at p. 405.

power extends, not only to the legislative and executive spheres, but also to the judicial. In such non-unitary states —that is to say, those which are not states within themselves —questions may arise between the central government and a subordinate, for instance, a provincial government, which on appeal may prove to involve constitutional or other serious issues.

The tendency in a non-unitary, or federal state, is to limit the action of the central government and split up its strength among co-ordinate and independent authorities [1] each originating in, and controlled by, the Constitution. A use can therefore be found for an extra-Dominion court of appeal in such cases. In these Dominions leave to appeal to the Judicial Committee is rather freely given.

§ 25. Unitary Constitutions

The unitary constitution, on the other hand, concentrates the strength of the state in one central sovereign power, be that power Parliament or despotic Czar.[2] This centralisation obviates such disputes and controversies as arise from divided powers, conflicts of internal laws and constitutional questions *inter se*. There is therefore no necessity for an extra-Dominion court of appeal in such cases. Further, consistently with Dominion autonomy the Royal prerogative of justice, if exercised at all, in a Dominion should be exercised on the advice and through the machinery of the Government of that Dominion. The Judicial Committee has laid it down as a general principle that the mere fact of a Dominion being a unitary Dominion is of itself sufficient to restrict the giving of leave to appeal from it. If, in a unitary Dominion, there be added a complete judicial system and the express wish of its government to abolish such appeals, the application of the settled principles of the Judicial Committee would indicate that any such prerogative

[1] *Cf.* such federal systems as those of the Cantons of Switzerland and the United States of America, upon the latter of which the Constitution of the Commonwealth of Australia was to some extent based; *per* Lord Halsbury in *Webb v. Outrim* (1907), A.C. 81 at 88.

[2] *Cf.* such a unitary system as that of England: Dicey, *The Law of the Constitution* (1927), p. 153.

vested in it, being purely theoretical, in the circumstances should be exercised as seldom as that of the King's omnipotence.

Each Dominion commenced its autonomous career regulated by statute, but preserved from statutory rigidity by its unwritten constitution, ever-developing freely according to the desires of its citizens coupled with the exigencies of its circumstances, so that each requires separate consideration.

§ 26. Canada

In Canada, the state is organised on a federal basis and while there is one general court of appeal, the Supreme Court of Canada, each province has its own courts, varying somewhat in constitution and jurisdiction. Each province constitutes a separate entity for judicial purposes, except that there is an appeal from its highest tribunal to the Supreme Court of Canada. The decision of the latter court is in all cases final and conclusive and no appeal may be brought to any other court, save in virtue of the royal prerogative.[1] Accordingly, no appeal lies as of right, but only by special leave, from the Supreme Court to the Judicial Committee, and this applies to any matter which the Governor-General in Council refers to the Supreme Court for hearing or consideration under a power conferred by the same Act.[2] The position, however, is peculiar in that in many cases an alternative appeal lies from a decision of the Provincial Courts direct to the Privy Council, passing over the Supreme Court, and this appeal is of right. The nature of the cases in which this appeal lies is regulated by Provincial or British Statute or by Order in Council and varies in each province. The effect of this double right of appeal is that a litigant may, in certain cases, elect to go before either the Supreme Court or the Privy Council, but if he chooses the former course, the case can then only come before the Privy Council by special leave. On an application for such leave, the

[1] Revised Statutes of Canada, 1906, c. 139, s. 59. The relevant statutes are referred to more particularly in sections 42 and 48 *post*.

[2] Revised statutes of Canada, 1906, c. 139, s. 60.

Judicial Committee recognises a distinction between cases in which the petitioner voluntarily chose to appeal to the Supreme Court and those in which he was compelled to go there. In the former class, special leave is granted only in a very strong case.[1]

It is important to observe that appeals from Canada to the Judicial Committee have been gradually decreasing for some years and that long before the enunciation by Viscount Haldane of the restrictive principle already quoted, it was applied to Canada. Before the constitution of the Supreme Court of that Dominion, there was a right to appeal from the courts then in existence where the value of the matter in controversy was beyond £500. It was then enacted by a Canadian Statute [2] that "the judgment of the Supreme Court shall in all cases be final and conclusive . . . saving any right which Her Majesty may be graciously pleased to exercise by virtue of Her Royal Prerogative." The Judicial Committee of the Privy Council thereupon restricted appeals and declared they were

"not prepared to advise Her Majesty to exercise her prerogative by admitting an appeal to Her Majesty in Council from the Supreme Court of the Dominion, save where the case is of gravity involving matter of public interest or some important question of law, or affecting property of considerable amount, or where the case is otherwise of some public importance or of a very substantial character." [3]

A further restriction occurred when the Judicial Committee decided that "where a man elects to go to the Supreme Court, having his choice whether he will go there or not, this Board will not give him assistance except under special circumstances." [4] Canada in her desire to abolish such appeals passed a Statute [5] with that object, but it was not worded with sufficient precision to restrict the prerogative under the well-known rule.[6] Notwithstanding this, the

[1] *Per* Lord Davey in *Clergue v. Murray* (1903), A.C. at p. 521.
[2] Revised Statutes of Canada, 1886, c. 135, s. 571, and The Parliament of Canada Act, 1875, 38 & 39 Vic. c. 38, s. 47.
[3] *Prince v. Gagnon* (1882), 8 A.C. at p. 105.
[4] *Per* Lord Davey in *Clergue v. Murray* (1903), A.C. at p. 523.
[5] Criminal Code of Canada (R.S. Can. 1906, c. 146, s. 1025).
[6] *Nadan v. The King* (1926), A.C. 482.

Judicial Committee accepted that indication and actually restricted the granting of leave to appeal from Canada, a federal state, as if it were a unitary state, following the desire of the people.

§ 27. Australia

In Australia, which is also a federal state, the position is somewhat similar. There is a general federal supreme court [1] which, however, is called the High Court of Australia and to which an appeal lies from the Supreme Court, so called, of each State, and its judgments as an appeal court are final and conclusive, saving an appeal to the Judicial Committee by special leave, except in certain cases of constitutional disputes. As in Canada, an alternative appeal lies from the Supreme Court of most of the states to the Judicial Committee according to the value of the subject-matter of the suit, the necessary amount being different in each state.

It must be observed that, in Australia and also in Canada, the existence of an appeal as of right from the Provincial or State Courts does not preclude the right of the Judicial Committee to grant special leave to appeal, if the prerogative has not otherwise been surrendered, in cases not coming within the appealable limits. Petitions for such leave, however, are rare and are discouraged by the Judicial Committee. The prerogative right to grant leave to appeal from a decision of the High Court is excluded in

> "any question, howsoever arising, as to the limits *inter se* of the constitutional powers of the Commonwealth and those of any State or States, or as to the limits *inter se* of the constitutional powers of any two or more States, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council."

Except for this exclusion, the Constitution "shall not impair any right which the Queen may be pleased to exercise by virtue of her royal prerogative to grant special leave of appeal from the High Court to Her Majesty in

[1] The Constitution of Australia is considered briefly in Chapter VI *post*.

Council." [1] The existence of an appeal in constitutional matters direct to the Privy Council from the decisions of the Supreme Courts of the States led inevitably to a conflict between the final jurisdiction of the Privy Council and the High Court,[2] which necessitated Commonwealth legislation altering the position. Its effect could not be more authoritatively stated than in the words of the Attorney-General of the Commonwealth of Australia: "the course of federal legislation has been to prevent any constitutional questions from being dealt with by the Supreme Courts of the States otherwise than upon the condition that any appeal shall be to the High Court only," and he adds,

"the tendency of judicial decision has been to extend the category of *inter se* questions to cover almost any constitutional question. The High Court has, in recent years, entertained appeals from orders of a Supreme Court granting leave to appeal to the King in Council, and has taken pains to keep the decision of constitutional questions in its own hands. In so doing it is following the evident general intention of Parliament as disclosed in the amendments made from time to time in the Judiciary Act, though there is great difference of opinion both upon the Bench and at the Bar as to whether certain of these amendments are valid . . . these questions are important in principle. . . . If the people of Australia really want to change the position with respect to appeals to the Privy Council, they are able to do so by action taken in Australia." [3]

The tendency of development in Australia has been in the same direction as that of Canada. Although they are both non-unitary states, from which leave to appeal would be readily granted, it has been restricted on the principle already mentioned, that the completeness of their judicial systems and the wishes of their Governments both discourage the granting of it.

§ 28. New Zealand

New Zealand is a unitary state, but she is in a somewhat similar position in that a double right of appeal exists, in

[1] Commonwealth of Australia Constitution Act, 1900, s. 74 (63 & 64 Vic. c. 12).

[2] See *Deakin v. Webb*, 1 C.L.R. 585; *Webb v. Outrim* (1907), A.C. 81.

[3] Latham, *Australia and the British Commonwealth*, pp. 116–17.

certain cases from the Appeal Court either direct to the Privy Council or to the Supreme Court. Under an Order in Council of 1910 an appeal from the Supreme Court only lies to the Judicial Committee when the Court itself grants leave to appeal. Otherwise special leave must be obtained from the Judicial Committee and this is the position also as to the native Appellate Court of which the decisions are "final and conclusive."

§ 29. The Union of South Africa

The Union of South Africa,[1] although federal in form, is really unitary in nature, the Provincial Councils being in the position of local government bodies rather than State Parliaments and being wholly subordinate to the Parliament of the Union. The same principle was applied to the judicial sphere and although each province has its own courts, the superior courts are co-ordinated so that the judicial system is organised as a unitary whole, rather than as a series of independent judiciaries. The position as to appeals to the Judicial Committee is, accordingly, wholly different, being much more restricted than in the case of Canada or Australia. The Constitution Act of 1909 consolidated all the Supreme Courts of the Provinces into one Supreme Court of South Africa, consisting of a Supreme Division and an Appellate Division. The former Supreme Courts of the Provinces became provincial or local divisions of the Supreme Court of South Africa, and appeals from lower courts which might have been taken before the Union to the Supreme Court of a Province are now taken either to the corresponding Provincial Division of the Supreme Court or to the Appellate Division according to the nature of the case. An appeal only lies from a provincial division of the Supreme Court to the Appellate Division by leave of the latter court. All further appeal as of right, is excluded by section 106 of the South Africa Act, 1909, which provides :

"there shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council but

[1] The relevant Statutes are referred to in Chapters V and VII *post.*

nothing herein contained shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council."

The effect is that, in South Africa, there is no appeal as of right to the Judicial Committee, but only by special leave and the right even to grant special leave is limited to appeals from the Appellate Division of the Supreme Court and will only be given in special circumstances.[1] Thus, the position is much more narrowly restricted by statute than in the case of Canada or Australia, and as we shall see, it is still more restricted in practice. The wish of the Union to discourage such appeals has been expressed by the Prime Minister and other Ministers of the South African Government.

§ 30. The Irish Free State

The Irish Free State is a completely unitary state with a fully equipped judicial system. The highest court is the Supreme Court, which is the final court of appeal. Article 66 of the Constitution has been held to preserve the Royal prerogative by stipulating that nothing shall impair it,[2] although the contrary has been argued. That Article declares :

" the decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other court, tribunal or authority whatsoever ; provided nothing in this Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

Accordingly, the only appeal from that Supreme Court which, even in theory, would lie, would be by special leave of the Judicial Committee.

Before considering the case of the Irish Free State in any

[1] *Whittaker v. Durban Corporation*, 90 L.J. (P.C.) 119 ; *Hull v. M'Kenna* (1926), I.R. at p. 405.

[2] *Bray Urban District Council v. Performing Right Society* (1930), I.R. at p. 526, *per* Sankey, L.C. This case is discussed at § 59 *post*.

detail it is important to observe that it complies affirmatively with all the tests, excluding such appeals in being a unitary Dominion, with a complete judicial system, and has expressed by its government its desire for such exclusion, and yet such appeals have been heard *in invitum*.

Attention should also be drawn to three essential matters which differentiate the status of the Irish Free State from that of other Dominions. The first is that Ireland long before its present status was determined was a kingdom, governed by its Lords and Commons and the ultimate judicial tribunal of which was the Irish House of Lords and not the Privy Council, as in the case of the other Dominions, which were then colonies and all of which are now kingdoms. The second is that the Judicial Committee Act, 1833, did not and, from its terms could not apply, to either Ireland or the Irish Free State. The third is that the Constitution of the Irish Free State is founded on an International Treaty solemnly made between the Irish and British peoples and implemented by statute of both Parliaments while the Constitutions of the other Dominions are founded only on Acts of the Imperial Parliament. This is important for

> " the constitution indeed of a Dominion in general originates in and depends upon an Act, or Acts, of the Imperial Parliament ; and these constitutional statutes are assuredly liable to be changed by the Imperial Parliament." [1]

It is, of course, otherwise where the Constitution originates in an International Treaty which requires the consent of both the high contracting parties before it can be altered or amended.

Whatever historical reasons there may be to support the old doctrine that anyone in the King's dominions had a right to appeal to the prerogative, that principle did not apply to Great Britain or Ireland. While they were separate Kingdoms the final appeal lay to the respective Houses of Lords and, after the Union, to the House of Lords of the United Kingdom. There was not, as there is not at present in England, any right to petition the King for leave to appeal

[1] *Per* Dicey in *The Law of the Constitution* (1927), at p. xxvi (8th ed.).

to his prerogative, since, whatever original jurisdiction had existed in this respect, had passed to the House of Lords. It is arguable that the only effective grant of the right to appeal to the prerogative took place when the Judicial Committee Act of 1833, which did not apply to Great Britain or Ireland, was passed. However that may be, the creation of the Judicial Committee and its jurisdiction to hear appeals to the King in Council dates from that Act and the jurisdiction is confined to appeals from the Courts in India, " and in the plantations, colonies and other Dominions of His Majesty abroad." [1] Consequently, unless the Constitution of the Irish Free State, or some other enactment, expressly conferred it, the Judicial Committee would seem to be without jurisdiction to hear appeals from the Irish Free State.

This point was raised before the Judicial Committee in the case of the *Bray Urban District Council v. Performing Right Society*,[2] but the Judicial Committee did not, as might have seemed necessary, expressly decide whether the prerogative had ever existed in Ireland or whether the Constitution conferred jurisdiction on the Judicial Committee in the case of the Irish Free State. They held that the point as to the existence of the prerogative in the case of the Irish Free State had " been concluded by the Constitution of the Irish Free State itself."

" It will be observed," said the Lord Chancellor, " that this proviso declares 'that nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave.' Although these words would appear to be plain and beyond dispute as applied to a case in which such special leave has been duly given, it was contended by the respondents that the proper reading of the words was, that nothing should impair the right, *if any*, of any person to petition His Majesty for special leave to appeal, and that there was no right at any time for any person from Ireland so to petition His Majesty in Council. Appeals from Ireland lay to the House of Lords, and therefore there was nothing for the proviso to operate upon.

[1] The Judicial Committee Act, 1833 (3 & 4 Wm. IV, c. 41).
[2] (1930) A.C. 377; (1930) I.R. 509.

"Their Lordships think that this is a wrong reading of the proviso which is found in the clauses of the Constitution which are to be construed with reference to the Articles of Agreement for a treaty between Great Britain and Ireland, and therefore with a reference to Article 2 of the Treaty, which provides that the position of the Irish Free State in relation to the Imperial Parliament and government and otherwise shall be that of the Dominion of Canada and that the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State. Accordingly the proviso specifically ensures that the right to petition His Majesty in Council shall subsist by stipulating that nothing shall impair it." [1]

If this decision means, as it seems to, that Article 2 of this Treaty in conjunction with Article 66 of the Constitution created a prerogative of appeal which had not existed before and vested the right to advise the Sovereign as to the exercise of that prerogative in the Judicial Committee, which before had not that jurisdiction, these Articles effect far-reaching changes by implication with the utmost economy of language. It might, indeed, reasonably be expected that so important a change would be effected by express words rather than by implication. Alternatively, that the absence of express words indicated an absence of any intention to revive, transfer, or change the incidence of so out-of-date a matter.

The wishes of the Irish Free State that the decisions of its Supreme Court should be supreme have been definitely expressed by declaratory legislation confirming, for instance, the construction placed on a statute by the Supreme Court.[2] This aspect of the matter is more fully dealt with later.[3]

§ 31. Dominions tend against Appeals to the Judicial Committee

It is clear therefore that the tendency in favour of the supremacy of their own Supreme Courts and therefore

[1] *Per* Lord Sankey, L.C., in *Bray Urban District Council v. Performing Right Society* (1930), I.R. at p. 525.

[2] *E.g.* the Land Act, 1926 (No. 11 of 1926), was a short statute confirming the construction placed by the Supreme Court on a section of the Land Act, 1923.

[3] Chapter VII *post*.

against appeals to the Judicial Committee exists in all the Dominions, though it differs in degree. This is due partly to the administrative and judicial completeness of each Dominion and partly to the increasing national sentiment of their citizens. Administrative self-reliance is noticeable in all the Dominions, but most so in the two unitary Dominions, South Africa and the Irish Free State.

In neither of these unitary states is there any appeal as of right, while in the other Dominions there is both an appeal as of right in special cases, and a general appeal by leave, except in certain constitutional questions in Australia. Further, the class and nature of cases in which the appeal as of right lies vary between the Dominions in which it exists, and in the federal Dominions a double right of appeal exists to both the Supreme federal court of the Dominion and to the Judicial Committee. These are differences in the statutory provisions for appeals, but, apart from express enactment, the considerations governing the grant of leave to appeal vary in practice within the principles mentioned according to the Dominion from which the petition comes.

This, necessarily, results from the fundamental difference in the actual organisation in the two classes of Dominions —unitary like South Africa and the Irish Free State and federal or non-unitary like Canada and Australia where each province or state retains its own local judiciary, but a central or federal court exists with appellate jurisdiction. In so far as this central or federal court is of superior authority to the local court there can be no actual conflict of decisions such as is possible in the United States of America where federal and state courts exist side by side throughout the whole country. If, therefore, it were desired to assert the superior jurisdiction of the central or federal courts while preserving the comparative independence of the local courts, this could be secured by vesting the final review of their decisions in a federal court. The balance of powers between the central and the local authorities is reflected in the many questions as to the extent and nature of these powers which call for judicial decision, and the importance of the issues raised might seem to require the existence of some tribunal,

independent of either federation or the several states, with authority to pronounce finally upon them. This consideration applies particularly to Canada where the provinces are specially jealous of their independence and privileges. It is shown, in the case of Quebec, by the presumption of French-Canadian Law in favour of the "sacred right to appeal." [1] It is not so applicable to Australia, where, as we have seen, no appeal is allowed to the Judicial Committee on any question as to the limit *inter se* of the constitutional powers of the Commonwealth and any state or states or of any two or more states, except by leave of the High Court. This does not of course cover the whole field of constitutional matters [2] but it seems evidence of a tendency to consider the authority of the Commonwealth as of greater importance than that of the states. Once again this does not of course apply to South Africa or the Irish Free State where no similar balance of powers exists.

§ 32. Dominion Sentiment against Appeals to the Judicial Committee

The national sentiment on the subject is more difficult to gauge with any accuracy save from expressions of Ministers of State or from legislation. From such indications, it is at least certain that none of the Dominions, except perhaps New Zealand, is perfectly satisfied with the position. While, undoubtedly, South Africa and the Irish Free State are most opposed to the existence of the appeal, neither Australia nor Canada is greatly in favour of it. So far, therefore, as this distinction has any reality it is a matter of the degree of tolerance in each Dominion. Viscount Haldane, who apparently gave a great deal of thought to this matter, commenting on the growth of the Empire, and he must also have meant the evolution of the Commonwealth, for he went on to refer to the Dominions, emphasised the fact that this very growth has led to the very substantial restriction of the exercise of the prerogative by the Sovereign on the advice of the Judicial Committee, indicated so clearly

[1] *Mayor of Montreal v. Brown and Another* (1877), 2 App. Cas. at p. 184.
[2] See Latham, *Australia and the British Commonwealth*, p. 114.

in *M'Kenna v. Hull*, where it was laid down that it is obviously proper for the Dominions more and more to dispose of their own cases in civil matters, but particularly in criminal matters in which appeals would only be allowed in most exceptional circumstances. It is clear that the Dominions do differ to a certain extent in this matter. Leave to appeal from India is more freely given than elsewhere, "but the genesis for that is the requirements of India, and the desire of the people of India"; further, whatever be the future of India, her status is at present different from that of the Dominions. In South Africa the general sense of that Dominion has caused the Judicial Committee to restrict the cases in which leave to appeal is given. Thus it was intended by the Judicial Committee that the principle of more and more or less and less as the Dominions please, the principle of autonomy, should be applied on this question of exercising the discretion as to granting leave to appeal. It is within the Sovereign's power, but the Sovereign looking at the matter exercises this discretion.[1]

This question is complicated in the non-unitary Dominions by the possible existence of divergent views between the federal and the state authorities, and again, it is not clear whether it is the wishes of the Government or of the people as a whole, which do not necessarily coincide, which are to be looked to. One objective test which has been applied is whether the provisions of the particular constitution indicate an intention, so far as possible, of making the highest court of the Dominion final;[2] and this applies particularly to Australia, South Africa and the Irish Free State. But technical points will not apparently be relied on by the Judicial Committee, though when made they must be given such legal effect as they have. Their express principle is to admit the freedom of the Dominion in this matter, so that even an irregularly expressed wish will be taken as an intimation if made by an authoritative person or body.

[1] *Hull v. M'Kenna* (1927), I.R. at pp. 404, 405.
[2] *Whittaker v. Durban Corporation*, 90 L.J. (P.C.) 119; 124 L.T. 104; 36 T.L.R. 784 P.C.

The wish of the Canadian Legislature was referred to by Viscount Haldane when he mentioned that on the occasion when Canada passed an Act [1] attempting to cut off the appeal to the Sovereign in Council altogether, but failed to do so owing to the absence of sufficiently apt words, the Judicial Committee accepting that indication greatly restricted the granting of leave to appeal in Canadian cases. Without a Ministerial or legislative indication of the national will, views may differ considerably as to the actual wish of any Dominion on the matter. Thus, if one turns to the pages of Professor Keith's latest work, one gathers the impression that the Irish Free State represents a very black sheep in the midst of a flock of Dominions more or less attached to the appeal to the Privy Council, and he reaches the conclusion that " the retention of the appeal, therefore, rests in effect on the ground that in the Dominions, as a whole, there is no clear demand for its abolition." [2] A comparison with the pages of Mr. Duncan Hall's work on the British Commonwealth of Nations conveys a very different impression and he states that " in the last generation or so feeling has steadily hardened against the idea of appeals from the Dominions being dealt with by an external court." [3] While Mr. Stokes more recently expressed the view that " several of the Dominions have shown unmistakably that they wish to reduce its power over their affairs to the absolute minimum." [4] The facts are strongly in favour of the latter view, but it is difficult to conceive of any court, however impartial, realising the full force of the feeling against its intervention.

§ 33. The Conflict between the Dominions and the Judicial Committee

It is unfortunate that the principles laid down cannot, as the matter stands, always be consistently applied, though

[1] *Nadan v. The King* (1926), A.C. 482.
[2] Keith, *Sovereignty of the British Dominions*, p. 262; see generally pp. 254, 262.
[3] Duncan Hall, *British Commonwealth of Nations*, p. 265.
[4] In *New Imperial Ideals*, at p. 86.

this is sometimes due to the gulf between judicial and executive action. The Canadian example already mentioned is in point. In the year 1926, the Imperial Conference declared that

"it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected."

In that very year, when the Canadian case mentioned came before the Judicial Committee of the Privy Council, they were obliged to hold invalid on technical grounds the legislative enactment by Canada, already referred to, designed to prevent the King in Council from giving effective leave to appeal from an order of a Canadian Court in a criminal case, the technical ground being the absence from the Statute of expressions adequate to restrict the prerogative under the legal rules of construction. It is right to add, however, as already mentioned, that the Judicial Committee accepted it as an indication that Canada desired to restrict such appeals, which is accordingly now the practice of the Judicial Committee.

This pronouncement of the Imperial Conference, of course, though indicating the attitude of the Dominion Delegates to the matter and therefore of great weight, has the force not of law but of a constitutional declaration. It actually effects no change in the legal position and is, in itself, incapable of doing so. The Judicial Committee on the other hand, although a committee of the Privy Council, is no part of the executive government of Great Britain,[1] but is an independent Court of Law which, however great be its respect for the declarations of the 1926 Conference, cannot give effect to them until they are implemented by actual enactment. This, no doubt a perfectly correct decision legally, was wholly opposed to the constitutional status, powers and wishes of Canada. Had the decision of the matter fallen within the sphere of the executive branch

[1] "We are not ministers in any sense; we are a committee of Privy Councillors who are acting in the capacity of judges," *per* Viscount Haldane in *Hull v. M'Kenna* (1926), I.R. at p. 403.

of the Government it cannot be doubted that the wishes of Canada, as expressed in her legislation, would have prevailed. Professor Keith justly says the Privy Council gave its decision " regretfully." Since the " pronouncement could benefit no one and must arouse resentment at this overriding of Dominion Sovereignty." [1] This instance illustrates the lack of co-ordination between the executive and the judicial branches of the government and the difference in the principles applying in each branch. Although, technically, the decision of the Judicial Committee is in the form of advice tendered to the King, it is advice tendered in a judicial capacity, upon only judicial matters, and the rigid principles of law must be applied as in any other court. Accordingly, it is quite possible for the advice tendered by the Judicial Committee to conflict not only with the wishes of a Dominion government but also with those of the British Government.

The decision in *Nadan v. The King*, referred to above, was in conflict with the principles of Dominion equality, including the complete legislative Sovereignty of the Canadian Parliament assented to by the British Government. Presumably, therefore, it was opposed to the wishes of the British Government. A later case concerned with the rate of pension payable under the Treaty of 1921 to Irish Civil Servants who retired in consequence of the change of government effected by it, showed a sharp conflict between the decision of the Judicial Committee and the views of both the British and Irish Governments. Its decision,[2] both originally and on further consideration, reversed that of the Supreme Court of the Irish Free State which both governments stated to be in accordance with their intention at the time of signing the Treaty. In that case the decision of the Judicial Committee was not followed by either government as it did not accord with their Treaty intentions. While this case supports the argument, if any be needed as to the legal principle upon which the Judicial Committee

[1] *Sovereignty of the British Dominions*, p. 256.

[2] *Wigg & Cochrane v. Attorney-General of the Irish Free State* (1927), I.R. 285; *in re Compensation to Civil Servants* under Article 10 of the Treaty (1929), I.R. 44.

works, it does not touch the point as to the wishes of the Dominions.

Sufficient has been written here to indicate that there is a tendency in the Dominions against allowing the Judicial Committee to interfere with the sovereignty of their legislature and Courts; that one of the principles of the Judicial Committee is that it becomes with the Dominions more and more or less and less as they please; and that the Judicial Committee is not always able, as in the Nadan case and the Wigg–Cochrane case, for various reasons to follow that principle. Does not this indicate a danger that the continuance of appeals to the Judicial Committee may tend to negative the inter-Dominion co-operation which is being sought in this and other phases of Commonwealth development? The Dominions claim and have complete sovereignty and the extent of the danger of Commonwealth discord is to be measured by the extent to which the Judicial Committee infringes that sovereignty. How far it does so will be our next enquiry.

CHAPTER V

THE PRIVY COUNCIL'S INFRINGEMENT OF DOMINION SOVEREIGNTY

§ 34. Prerogatives and Dominion Sovereignty.—§ 35. The Principle of Parliamentary Sovereignty.—§ 36. Dominion Sovereignty is Infringed.—§ 37. A Commonwealth Court is not an Infringement.—§ 38. The Present Infringement is Theoretical.—§ 39. It is More, as the Dominions do not Control it.—§ 40. It is Not Common to all the Dominions.—§ 41. It Interferes with Dominion Laws.—§ 42. Canada.—§ 43. New Zealand.—§ 44. Australia and Union of South Africa.—§ 45. The Irish Free State.

§ 34. Prerogatives and Dominion Sovereignty

It has been pointed out already that complete autonomy involves the exercise of all sovereign rights, legislative, executive and judicial, by a Dominion. In each of the Dominions such prerogatives as survive must, unless there be a diminution of sovereignty, be exercised by the Dominion itself. The prerogative of mercy is at present exercised by each Dominion and it is difficult to see why the prerogative of justice should not be exercised in the same way by each Dominion through the machinery of its Supreme Court.

It would be appropriate to consider here why and how and the extent to which the exercise of the Royal prerogative on the advice of the Judicial Committee of the Privy Council is an infringement of Dominion Sovereignty.

§ 35. The Principle of Parliamentary Sovereignty

The principle of Parliamentary Sovereignty was defined by Professor Dicey so far back as 1885 and confirmed by him in 1927 as meaning

"neither more nor less than this, namely, that Parliament has the right to make or unmake any law whatever; and further, that no person or body is recognised by the law of England as

having the right to override or set aside the legislation of Parliament, and further, that this right or power extends to every part of the King's Dominions." [1]

Presumably under the doctrine of equality of status laid down by the Imperial Conference, 1926,[2] this would mean that no person or body (e.g. the Privy Council) would have a right to override or set aside the legislation of any Dominion Parliament. This is emphasised by the terms in which the Imperial Parliament by legislation declared that all powers of government and all legislative, executive and judicial authority are derived from and should be exercised by the people of the Dominion concerned; [3] and as the learned Lord Dunedin has pointed out:

"Inasmuch as the Crown is a party to every Act of Parliament it is logical enough to consider that when the Act deals with something which before the Act could be effected by the prerogative, and specially empowers the Crown to do the same thing, but subject to conditions, the Crown assents to that, and by that Act, to the prerogative being curtailed." [4]

Notwithstanding this, there is some difference amongst constitutional thinkers not on the question as to what sovereignty means, but whether the Dominion Sovereignty has been infringed by the exercise of the prerogative of justice on the advice of the Judicial Committee instead of completely by the Courts of the respective Dominions. It is, therefore, important carefully to consider their opinions in relation to the Constitutions of the various Dominions and also the opinions of the several Dominions themselves in this respect, as evidenced by their legislation and otherwise.

[1] *The Law of the Constitution*, p. xviii. By the Commonwealth Act, 63 and 64 Vic. c. 12, the Imperial Parliament gave the Parliament of the Australian Commonwealth power to modify the Commonwealth Act, and the Imperial Parliament under The National Insurance Act, 1911, gave power to the Insurance Commissioners and to the Board of Trade to modify the Insurance Act.

[2] Cmd. 2768.

[3] *Vide* The Irish Free State Constitution Act, 1922, Sess. 2 (13 Geo. V, c. 1).

[4] *Per* Lord Dunedin in *Attorney-General v. De Keyser's Royal Hotel Ltd.* (1920), A.C., p. 526.

§ 36. Dominion Sovereignty is Infringed

Professor Berriedale Keith takes the view, which it is here submitted is correct, that " the submission of the judgments of Dominion Courts to the revision of the Privy Council is unquestionably a distinct diminution of Dominion sovereignty." [1] On the other hand, Dr. Nathan states [2] that

" the continued existence of appeals to the Judicial Committee . . . does not affect the independent status of the Dominions, any more than the status of any international state is affected by the Permanent Court of International Justice at the Hague. The final appeal to the Judicial Committee is not a mark of the sovereignty of the Crown, but a matter of convenience in that there should be a final court of resort for the members of the British Commonwealth. The sovereignty of the Crown as the dispenser of justice, would still be exercised if the final judgment on appeal were given in the particular Dominion in which the case arose."

The attitude of Dr. Nathan here seems, with respect to so distinguished a scholar, to be unsound inasmuch as the history of the Judicial Committee shows clearly that it is based on the Royal prerogative and is therefore in his words " a mark of the sovereignty of the Crown," while as will be submitted later the facts show that, whatever can be said for some Commonwealth tribunal, the Judicial Committee is anything but " a matter of convenience " to litigants. To say, as Dr. Nathan does, that the " appeal to the Judicial Committee is not a mark of sovereignty," seems inconsistent with his next point, that " the sovereignty of the Crown . . . would still be exercised if the final judgment on appeal were given in a particular Dominion." It is exercised in a particular Dominion, Great Britain, which it must not be overlooked is equal in status with the other Dominions, but that is not the point. Geography counts in the matter for little more than convenience. The point is that to exercise the Royal prerogative in such a manner as to override or set aside the legislation of a Parliament which is autonomous is to infringe the sovereignty of that parliament.

[1] *Sovereignty of the British Dominions*, p. 225.
[2] *In Empire Government*, pp. 91, 92.

§ 37. A Commonwealth Court is Not an Infringement

When Dr. Nathan expresses the view that it would be a convenience "that there should be a final court of resort for the members of the British Commonwealth," he touches on topics different from those of "sovereignty" and the particular court of the Judicial Committee which were the topics in question. It may, however, be said at once that the idea of a common final court of appeal for the whole Commonwealth is quite compatible with the full sovereignty of each member-state, but such a court, like that at the Hague, which Dr. Nathan mentions would be distinguished by characteristics other than those of the Judicial Committee. Such a truly Commonwealth court would admit the sovereignty of all the states entitled to have recourse to it and their absolute legal equality of status; and would be constituted by agreement between all those states which not only would take equal shares in the appointment or election of its judges and settlement of its procedure, practice and place of sitting, but also would make provision for asking the court for advisory opinions, the determination of special issues, the arbitral settlement of certain disputes, in addition to litigation, and such other matters as would enhance the usefulness of such a tribunal.

The sound opinion seems to be, to return to the germane question, that the exercise, on the advice of the Judicial Committee, of the Royal prerogative to hear and determine Dominion appeals is an infringement of Dominion Sovereignty.

§ 38. The Present Infringement is Theoretical

It may, perhaps, be argued that such an infringement is purely theoretical on two grounds. The first is, that by reason of their autonomy all the Dominions possess sufficient powers, at present, to regulate or discourage such appeals in accordance with their actual wishes, whether this be done directly or indirectly; that this is true is merely another way of saying that, as the matter stands, an undesirable

and unnecessary controversy is possible upon the subject between the Judicial Committee and a Dominion, as will be indicated by a concrete and recent example in its proper place.[1] The second is, the constitutional position itself, which has already been stated. The "wishes of the part of the Empire primarily affected"[2] was recognised as the governing consideration, except that where proposed changes affected other parts prior consultation and discussion was desirable. The statement that "it was no part of the policy of His Majesty's Government in Great Britain" that the question should be determined otherwise than in accordance with these wishes is a sufficient guarantee not only of the non-opposition of the Government, but also of its effective assistance so far as is necessary, and on request, to effect proposed changes. The fundamental declaration of equality involves this right of the Dominions to regulate the question according to their own desires, but no legislative reforms have been enacted to convert this pious aspiration into a legal right for the protection of the Dominions. The complexity, however, of the matter, and its possible reactions, not only on the Commonwealth but also on the Empire, raise issues which were, with a result which will be considered in a later chapter,[3] discussed at the Imperial Conference of 1930 with a view to settling a plan for some amended or substituted tribunal more applicable to the needs of the Commonwealth in its present state of development. In the absence of such a scientific method of dealing with the problem "it seems, however," in the words of Professor Keith,

> "that if the pressure continues the appeal must be renounced formally as it probably has been in practice. It is clearly inconsistent with autonomy, if that is pressed to its logical conclusion, and, while the other Dominions may not deem it wise or desirable thus to stress the point, they cannot be held to fetter the action of a Dominion that entertains a strong dislike to the Court."[4]

[1] Chapter VII *post.*
[2] Cmd. 2768.
[3] Chapters IX and X *post.*
[4] *Sovereignty of the British Dominions*, p. 262.

§ 39. IT IS MORE, AS THE DOMINIONS DO NOT CONTROL IT

There are at least three aspects in which the hearing of Dominion Appeals by the Judicial Committee, as at present constituted, is more than a merely theoretical infringement of the sovereignty of the Dominions.

First, the Judicial Committee is constituted and regulated entirely by one only of the Dominions over which the others have no control, though they are sometimes represented on it; it was created and has been amended and is governed by Acts of the British Parliament. Dr. Nathan says,

"the reason for this, however, is purely historical, and this fact no more interferes with self government in the Dominions than does the fact that the succession to the Crown, which is the head of each Dominion, is regulated by an Act of the Imperial Parliament." [1]

This is undoubtedly true, as regards its present constitution, but does he overlook the fact that the Parliament which created it would undoubtedly have the power to alter its constitution? [2] and would he suggest that the existence of a court of appeal for the Dominions, which not only was created before their autonomy was admitted, but also the constitution of which might be altered independently of their will, is not a derogation from their sovereignty? Having regard to the declarations of the Imperial Conferences, it is, of course, unlikely that any such change would be effected without the consent of the Dominions, but it is significant that these declarations have never since been implemented and they consequently afford no legal protection to the Dominions. It is further interesting to observe that the very analogy used by Dr. Nathan is deprived of its usefulness by the recommendation of the Imperial Conference, 1930,[3]

"that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the

[1] *Empire Government*, p. 56.

[2] Except, perhaps in the case of the Irish Free State, where the obligations of the Treaty of 1921, so far as it can be held to have provided for an appeal, limit the action of the British Government in the absence of consent of the Irish Free State.

[3] Cmd. 3717, p. 21.

assent as well of the Parliaments of all Dominions as of the Parliament of the United Kingdom."

This indeed makes more striking the absence of any adequate measure upon the subject of a final and supreme tribunal and suggests the appropriateness of some convention applicable to the constitution of the Judicial Committee, so far as it may continue to be a court of appeal for the Dominions.

Nothing is said here as to the theoretical power of the British Parliament to alter the jurisdiction and authority of the Judicial Committee in relation to the Dominions because these matters are already covered by the constitutional convention that "legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned." [1] It may, however, be objected that, for full sovereignty, a Dominion should have the exclusive regulation of its final court of appeal and not merely an equal voice with the other members of the Commonwealth, but this ignores the fact that the court is contemplated as a Commonwealth Court and not solely as the final court of appeal for each individual Dominion. Clearly if the court is to be, in any real sense, a Commonwealth Court, it must be commonly controlled, as in Dr. Nathan's example of the Permanent Court of International Law at the Hague.

§ 40. It is Not Common to all the Dominions

Secondly, the present Judicial Committee is, in one sense, not sufficiently a common court; in another sense, it is, perhaps, too common. Assuming as we have been doing, that a common court is desirable, the existing court is not the common court of the British Commonwealth. Except in matters of prize law, where the Judicial Committee has jurisdiction, appeals from the higher Courts of England, Scotland, Wales and Northern Ireland lie not to the Judicial Committee but to the House of Lords, as they did from the whole of Ireland before the Treaty.[2] These two final courts, although largely identical in personnel, are distinct

[1] Cmd. 2768, of 1926, p. 18.
[2] See discussion on this in Chapter IX *post*.

in jurisdiction and procedure. This anomaly, due to historical reasons, was noted at the Imperial Conference of 1911 and it was proposed by Mr. William Hughes, the Prime Minister of Australia, to combine the two tribunals into one Imperial Court of Appeal with the addition of two law Lords to the existing number. He hoped thus to procure uniformity in procedure and to provide a more effective symbol of unity than the existing dual system, in which he considered the Judicial Committee was inferior to the House of Lords. The proposal, however, met with little enthusiasm from either the Dominion representatives or those of the Home Government and was not adopted.[1] The matter was again taken up at the Imperial War Conference of 1918 which in vain called upon the several governments to give prompt consideration to the question of creating a single Imperial Court of Appeal.[2] Again, at the Imperial Conference of 1926 [3] the matter was raised but nothing effective was done beyond the declarations appearing elsewhere in this work until the Conference of 1930,[4] when the Tribunal, discussed in Chapter VIII, was suggested. In the Dominions the tendency is rather towards complete abolition of the present appeal than the creation of a common court, "while," it has been said, "the legal profession of the United Kingdom is too conservative to contemplate with equanimity the disappearance of the present system under which the House of Lords is the final Court of Appeal," [5] for Great Britain. The principle of equality would seem to demand that a common court should hear appeals from Great Britain as well as from the Dominions, that is, from all the members of the Commonwealth who are equal in status and not only from some. It is also desirable for the same reason that the jurisdiction of the common court should, in strict theory, be confined to appeals from the courts of members of the Commonwealth only and not also from those of portions of the British Empire outside the

[1] See *Proceedings of Imperial Conference*, 1911, pp. 134 *et seq.*
[2] *Proceedings*, 1918. [3] Cmd. 2768; see also § 10 *ante*.
[4] Cmd. 3717; see also § 106 *post*.
[5] Keith, *The Sovereignty of the British Dominions*, p. 259.

Commonwealth. This, however, seems more a matter of dignity than status, and is trivial except in so far as the creation of a court for appeals from the latter portions of the Empire would leave the common court free to devote itself exclusively to appeals from courts in the Commonwealth, a not unimportant consideration, if the new court were found to be an attractive tribunal for the determination of controversies from the whole Commonwealth.

§ 41. It Interferes with Dominion Laws

The third aspect in which the functioning of the Judicial Committee is a diminution of Dominion Sovereignty arises from its interference with the powers of the Dominions to regulate its jurisdiction in so far as it runs in their territories. In this sphere, the principle of full autonomy involves that each Dominion, and not some extra-Dominion tribunal such as the Judicial Committee, should have power to regulate by legislation, the matters in which an appeal lies and which would be affected by such an appeal in or from Dominion Courts, either as of right or by special leave. Here, however, there is no uniformity among the Dominions, and the matter cannot be considered apart from the proposed recognition of the legislative powers of the Dominions.[1] It has thus both a present and a future aspect.

§ 42. Canada

In the case of Canada it is doubtful whether the Parliament of this Dominion has power to restrict the matters in which leave to appeal may be given. Canada has only limited powers to amend her Constitution, but the matter would appear to be independent of Constitution amendment. The Constitution provides, by section 101, that the Parliament of Canada may, notwithstanding anything in the Act, from time to time provide for the constitution, maintenance and organisation of a general court of appeal for Canada, and for the establishment of additional courts for the better

[1] *Cf.* Report of the Conference of 1929 on the Operation of Dominion Legislation (Cmd. 3479), and Report of Imperial Conference, 1930 (Cmd. 3717).

administration of the laws of Canada. It is not clear whether this would include powers to regulate the jurisdiction of the courts set up. The Criminal Code of Canada appeared, in one section,[1] to prevent the Judicial Committee from giving effective leave to appeal against an order of a Canadian Court in a criminal case, but it has been held that, if and so far as it was intended to do so, it is invalid.[2] The decision turned upon the view of the Judicial Committee that the legislative authority of the Parliament of Canada as to criminal law procedure, under section 91 of the Constitution, is confined to action to be taken in Canada, but it was also laid down that enactment annulling the Royal prerogative to grant special leave to appeal would be inconsistent with the Judicial Committee Acts and therefore would be invalid under the Colonial Laws Validity Act. Professor Keith, perhaps correctly, says that the result of this decision is that "the right of the Privy Council to hear appeals from Canada is wholly unfettered"[3]; it certainly seems to contradict the implication of the passage already quoted from Viscount Haldane that Canada could restrict appeals by "sufficiently precise words assented to by the Sovereign."[4]

§ 43. New Zealand

New Zealand, however, does not appear to have any powers to restrict appeals from her Supreme Court to the Judicial Committee of the Privy Council.

§ 44. Australia and South Africa

In both Australia and South Africa the legislature has power under the Constitution to limit the matters in which leave to appeal to the Judicial Committee may be asked, except as regards South Africa in the case of judgments given under Colonial Courts of Admiralty Act, 1890.[5] Thus,

[1] Criminal Code (R.S. Can., 1906, c. 146, s. 1025).
[2] *Nadan v. The King* (1926), A.C. 482.
[3] *Sovereignty of the British Dominions*, p. 256.
[4] See § 32 *ante*; *Nadan v. The King* (1926), A.C. 482.
[5] Commonwealth of Australia Constitution Act, 1900, s. 74; South Africa Act 1909, s. 106.

with the exception noted, the Parliaments in both these Dominions possess full power to restrict the exercise of the prerogative by the Judicial Committee to any required extent. The exercise of the power is in each case subject to reservation [1] of the proposed enactment for the signification of the King's pleasure, but this provision, in view of the declared constitutional principles and practice, does not now cause any difficulty. In Australia, however, the amendment of the Constitution involves the troublesome requirement of a popular vote in which a majority both of the electors voting in each State and of all the electors voting must be obtained. Appeal as of right does not, of course, exist in South Africa, and in Australia it applies only to judgments, in certain matters, of the State Courts. The regulation and restriction of these matters are possibly within the power of the Parliament of Australia, but the position is uncertain, and it is clearly a matter in which the States would both require and insist on an equal voice.[2]

§ 45. The Irish Free State

The Irish Free State occupies an intermediate position in the matter. The only appeal from that Dominion to the Judicial Committee is that by special leave in so far as it has been preserved, or perhaps conferred,[3] by Article 66 of the Constitution and the Oireachtas possesses full power to amend the Constitution "within the terms of the Scheduled Treaty." The question, therefore, of restricting the matters in which leave to appeal may be asked or of abolishing the appeal altogether, depends not upon any restriction of the powers of the Oireachtas, but upon whether the Treaty provided for the existence of any appeal. If it did, the appeal must continue to exist or be altered or abolished by the agreement of both parties to the Treaty; no change can be effected by either party alone. Mr. Blythe, the Irish Free State Minister for Finance, has declared that

[1] As to the proposed restrictions on the power of reservation, see Chapter IX *post*.

[2] See Latham, *Australia and the British Commonwealth*, p. 33.

[3] See § 30 *ante*.

the proviso in the Constitution providing for appeals to the Judicial Committee would have been deleted long ago had the government any certainty that the matter would have been thereby disposed of, since the matter had its roots in the Treaty of 1921.[1] Even the most ardent Imperialist could not for a moment maintain that there was any express provision in the Treaty on the matter. Professor Keith asserts that because "the right to appeal is an essential feature of the Canadian Constitution" it is, therefore, "implied in the Free State Constitution."[2] This is, obviously, inaccurate in two respects: first, there is no right to appeal in the Irish Free State, but only a right to petition for special leave to appeal, which may not be granted; and secondly, this latter right is not an implied right but is actually expressed as a saving clause in the Irish Free State Constitution, that

"nothing in this constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to his Majesty in Council or the right of his Majesty to grant such leave";

nowhere in the Treaty or the Constitution is the right granted expressly which is here preserved. This leads directly to the substance of Professor Keith's point. It is that the prerogative right of the King in Council to grant leave to appeal from decisions of Irish Free State Courts is implied in the Treaty. This view is, of course, based on the provision of Article 2 of the Treaty that subject to later provisions therein,

"the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada, and the law practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament, to the Dominion of Canada shall govern their relationship to the Irish Free State."

This is the only provision on which the "right to appeal" could be implied, and seemingly only by force of whatever

[1] Dail proceedings, Nov. 1921.
[2] *Sovereignty of the British Dominions*, p. 211.

meaning the words " and otherwise " may have, since the provision as to the Crown and its representative clearly refers only to the executive branch of the Government and not to the judicial, and we have seen that the proceedings of the Judicial Committee are a wholly judicial matter.[1] It is, certainly, a sufficiently important matter to have merited more precise and express provision and to adopt the words a distinguished judge used in another connection

" it is not reasonable to suppose that the British Parliament ever intended so important an end to be attained by indirect and circuitous methods. In such an important matter direct authority would be given or none at all, and none is directly given." [2]

The Judicial Committee has, however, endorsed Professor Keith's view of the implications of Article 2 of the Treaty [3]; although the case of *Hull v. M'Kenna* is cited on the same page no reference is made to the pronouncement, already quoted, there made by Viscount Haldane as to the peculiar status of the Irish Free State and its analogy to South Africa, rather than Canada, " from the point of view of justice." [4]

It seems clear, therefore, that the sovereignty of the Dominions is infringed by the exercise of the Royal prerogative to override or set aside the decisions of their Supreme Courts by means of the Judicial Committee of the Privy Council, a tribunal which the Dominions neither created nor now regulate; which is not common to them all equally and over appeals to which they cannot in theory, at least, exercise full control.

Dissatisfied with these infringements of their sovereignty, some of the Dominions have taken steps by legislation, over which they had full control, and otherwise to preserve, protect and control fully the administration of Justice within their borders from interference by the Judicial Committee, and this will be considered in the next chapter.

[1] See Chapter III *ante*.
[2] Hodges, J., quoted in *Webb v. Outrim* (1907), A.C. 81.
[3] *Performing Right Society v. Bray Urban District Council* (1930), I.R. at p. 526.
[4] See *Hull v. M'Kenna* (1926), I.R. 402.

CHAPTER VI

LEGISLATIVE AND OTHER EFFORTS TO PRESERVE DOMINION SOVEREIGNTY

(1) BY THE NON-UNITARY DOMINIONS

§ 46. These Efforts took various Forms.—§ 47. Direct and Indirect Efforts.—§ 48. Canada.—§ 49. Australia.

§ 46. These Efforts took Various Forms

As the views of Dominion governments in the generation or so preceding the year 1920 steadily hardened against the idea of appeals from the Dominions being dealt with by an external court,[1] legitimate efforts were made by the Dominions, particularly the unitary Dominions, to discourage the bringing of such appeals, which were and are regarded as infringements of their sovereign rights to "dispose completely of" their "own judicial questions."[2] Some of these efforts took the form of pronouncements by Ministers of State, some took the form of statute, which in effect limited or restricted such appeals, some took the form of statute declaring that the true construction of the law was that found by the Dominion Supreme Court, and two[3] at least took the form of a refusal to adopt the decision of the Judicial Committee.

§ 47. Direct and Indirect Efforts

The history of these efforts illustrates a point which must not be overlooked in the interests of the peace of the Commonwealth and which shows forcibly the anomalous

[1] *Per* Duncan Hall in *The British Commonwealth of Nations*, p. 265.
[2] *Per* Viscount Haldane in *Hull v. M'Kenna* (1926), I.R. at p. 405.
[3] *Baxter's Case* (4 C.L.R. 1087), in which the Australian High Court refused to follow the Judicial Committee in *Webb v. Outrim* (1907), A.C. 81; also *Wigg & Cochrane v. Attorney-General of the Irish Free State* (1927), I.R. 285, which the Irish Government refused to follow.

position occupied by the Judicial Committee in the Commonwealth scheme, however beneficial it may, formerly, have been, and may continue now to be in the Empire as distinguished from the Commonwealth. It is that although the powers of direct restriction on appeals to the Privy Council are to some extent limited in the case of some of the Dominions, in all the existing legislative powers are sufficient, indirectly, to restrict or render ineffective such appeals. This is a necessary consequence of the extensive, and constitutionally exclusive, legislative powers of the Dominions, and it is a regrettable anomaly that the retention of an undesired court should have the effect of forcing a Dominion legislature to achieve its ends by indirect means. The existence of the court is, therefore, dangerous in the sense that it is capable of raising a conflict between the legislature and the judiciary, in which the former can usually win, but only after considerable friction and much misunderstanding; it can even cause a serious dispute, and has in fact done so, between one Dominion Government which supported the decision of its own Supreme Court and another Dominion Government which supported the finding of the Judicial Committee.[1]

It is convenient to continue the consideration of the various Dominions in their order of seniority in the Commonwealth, though it will probably be found that the latest holds as pronounced a view and is just as active as any of the others in supporting her own legal sovereignty against the infringement just mentioned.

The two non-unitary Dominions come first.

§ 48. Canada

In Canada it is stated that "Quebec has no intention of losing the valuable protection of the Judicial Committee against any inroads on the integrity of her rights under the federal Constitution."[2] This provides the key to the

[1] *Wigg & Cochrane v. The Attorney-General of the Irish Free State* (1927), I.R. 285. This controversy is discussed more fully at § 58 *post*.

[2] Keith, in *Sovereignty of the British Dominions*, p. 261. Its effect in relation to minorities is considered in Chapter VIII, §§ 80, 81.

difference of opinion which exists in Canada as to the continuance of such appeals arising from the rivalry of the Provinces under the federal form of Government. How far such inroads are likely and how far the Judicial Committee affords protection against them which could not be got from the Federal Supreme Court does not appear. This may account for the inactivity of the Canadian legislature as compared with other Dominion legislatures in the matter, and it may well, and with reason, have induced Mr. Mackenzie King " to refrain from securing a resolution in favour of the abolition of the appeal." [1] Notwithstanding all this, Canada did make a serious attempt to limit the right of appeal to the Judicial Committee.

Canada has a fully equipped and efficient system for administering justice. There is a Supreme Court of Canada consisting of the Chief Justice and five judges, and it hears appeals from all the Provincial Courts ; there is also a Court of Exchequer with one judge. The Province of Ontario has a Supreme Court consisting of the Court of Appeal composed of the Chief Justice and five judges and High Court. The Province of Quebec has the King's Bench with a Chief Justice and five judges and a Superior Court and Vice-Admiralty Court. In Nova Scotia, New Brunswick, Prince Edward Island, British Columbia, Manitoba and Newfoundland there are Supreme Courts and puisne judges.

One of the first legislative efforts in Canada to restrict appeals to the Privy Council was in the year 1794, when the Legislature of Lower Canada passed an Act [2] enacting that the judgment of the Court of Appeal should be final in all cases under £500 in value and the Judicial Committee gave effect to it in *Cuvillier v. Aylwin*,[3] decided in the year 1832, by refusing to hear an appeal that was in contravention of it, although there was no special saving in the Colonial Act of the rights and prerogative of the Crown. The relevant Imperial Statute declared that all laws passed by

[1] Keith, *The Sovereignty of the British Dominions*, p. 261.
[2] The Lower Canada Colonial Act (34 Geo. III, c. 6).
[3] 2 Knapp. 72 ; 3 State Trials, N.S., App. 1280 ; 12 E.R. 406 P.C. ; *cf. re Louis Marois*, 15 Moo., P.C. 189.

the legislature of a colony should be valid and binding within the colony and directed that the Colonial Court of Appeal should be subjected to such appeal as it was previously to the passing of the Act and also to such further and other provisions as might be made in that behalf by any Act of the Colonial Legislature. This decision was adversely commented on in later cases, where it was pointed out that the Act of the Legislature of Lower Canada there in question was expressly authorised by the British Act of Parliament [1] which empowered the Legislature of Lower Canada to limit and define the right of appeal,[2] but this does not affect its value as showing the tendency in Canada at that time towards judicial autonomy.

A more important effort was that made in 1875 on the passing of the Act [3] establishing the Supreme Court of Canada. By section 47 it enacted that the judgments of the Supreme Court

" shall in all cases be final and conclusive and no appeal shall be brought from any judgment or order of the Supreme Court to any Court of Appeal established by the Parliament of Great Britain and Ireland by which appeals or petitions to her Majesty in Council may be ordered to be heard saving any right which Her Majesty may be graciously pleased to exercise by virtue of her Royal prerogative."

In 1877 the Judicial Committee considered this section and held that the prerogative existed; that it was left untouched and preserved by that section, but they declined to exercise it in the particular case.

Another effort in 1875 was made by section 90 of the Quebec Controverted Elections Act of that year which enacted that the decisions of the Superior Court of Quebec in an election petition " shall not be susceptible of appeal," and in the year 1876 the Judicial Committee held that there

[1] The Canada Act (31 Geo. 3, c. 31).

[2] *Cf.* 5 Moo., pp. 294, 304; *Boswell v. Kilborn*, 12 Moo., P.C. 467; *in re Louis Marois*, 15 Moo., P.C. 189.

[3] The Supreme Court was established under the authority of the British North America Act, 1867 (30 and 31 Vic. 3), s. 101, by the Supreme Court of Judicature Act, 1875 (36 and 37 Vic. c. 66), s. 47, re-enacted by Revised Statutes of Canada, 1906, c. 139.

was no prerogative right in the Crown to review the judgment of the Superior Court on an election petition, but that where the prerogative of the Crown existed it cannot be taken away except by express words.[1] This, doubtless, refers to the Act of the Parliament of Canada [2] which enacts rules of interpretation to be applied to all future legislation, when not inconsistent with the intent of the Act or context in these terms,

"no provision or enactment in any Act shall affect in any manner or way whatsoever the rights of her Majesty, her heirs or successors, unless it is expressly stated therein that her Majesty shall be bound thereby."

The Canadian Act [3] passed in the year 1876, amending the Canadian Insolvent Act, 1875, [4] enacted that "the judgment of the Court," i.e. the Canadian Court of Appeal, "to which under this section the appeal can be made shall be final," and in the year 1880, on it being submitted that this took away the jurisdiction of the Judicial Committee to entertain such an appeal, it was held that [5] this section was valid as being within the competence of the Canadian Parliament, but it infringed neither the powers given to the Provincial legislatures by section 92 of the British North America Act, 1867, nor the Royal prerogative to allow appeals to the Judicial Committee as a matter of grace.

In 1906 the Criminal Code of Canada [6] enacted

"notwithstanding any Royal prerogative or anything contained in the Interpretation Act or in the Supreme Court Act, no appeal shall be brought in any criminal case from any judgment or order of any court in Canada to any court of appeal or authority by which in the United Kingdom appeals or petitions to His Majesty in Council may be heard."

In the year 1926 the Appellate Division of the Supreme Court of Alberta by a majority gave leave in a criminal case [7] to appeal to the Judicial Committee, and it was submitted that this section operated to limit the Royal prerogative to hear appeals in criminal cases. It was, however, held that the section if and so far as it intended

[1] *Théberge v. Laudry*, 2 A.C. 102.
[2] 31 Vic. c. 1, s. 7 (33).
[3] 40 Vic. c. 41, s. 28.
[4] 38 Vic. c. 16, s. 128.
[5] *Cushing v. Dupuy*, 5 A.C. 409.
[6] R.S. Can., 1906, c. 146, s. 1025.
[7] *Nadan v. The King* (1926), A.C. 482.

to prevent the King in Council from giving effective leave to appeal against an order of a Canadian Court in a criminal case, was invalid; that the legislative authority of the Parliament of Canada as to criminal law and procedure under section 91 of the British North America Act, 1867, is confined to action to be taken in Canada; that an enactment annulling the Royal prerogative to grant leave to appeal would be inconsistent with the Judicial Committee Acts, 1833 and 1844, and therefore would be invalid under section 2 of the Colonial Laws Validity Act, 1865;[1] that the Royal assent to the Criminal Code could not give validity to an enactment which was void by Imperial Statute and that the exclusion of the prerogative could be accomplished only by an Imperial Statute. The principles governing this matter were so clearly reviewed in this case that it is desirable to quote the Lord Chancellor:

"The practice of invoking the exercise of the Royal prerogative by way of appeal from any court in His Majesty's Dominions has long obtained throughout the British Empire. In its origin such an application may have been no more than a petitory appeal to the Sovereign as the fountain of justice for protection against an unjust administration of the law; but if so, the practice has long since ripened into a privilege belonging to every subject of the King.

In the United Kingdom the appeal was made to the King in Parliament, and was the foundation of the appellate jurisdiction of the House of Lords; but in His Majesty's Dominions beyond the seas the method of appeal to the King in Council has prevailed and is open to all the King's subjects in those Dominions. The right extends (apart from legislation) to judgments in criminal as well as in civil cases; see *Reg. v. Bertrand.*[2] It has been recognised and regulated in a series of statutes, of which it is sufficient to mention two—namely the Judicial Committee Act, 1833,[3] and the Judicial Committee Act, 1844.[4] The Act of 1833

[1] *Cf.* the suggestions as to the Colonial Laws Validity Act contained in the Report of the Imperial Conference, 1930, and referred to more particularly at § 105 *post.*

[2] *Reg. v. Bertrand,* L.R. 1 P.C. 520.

[3] 3 and 4 Will. IV, c. 41.

[4] 7 and 8 Vic. c. 69.

recites that 'from the decisions of various courts of judicature in the East Indies and in the Plantations, Colonies and other Dominions of his Majesty abroad, an appeal lies to his Majesty in Council,' and proceeds to regulate the manner of such appeal; and the Act of 1844, after reciting that

> 'the Judicial Committee acting under the authority of the said Acts (the Act of 1833 and an amending Act) hath been found to answer well the purposes for which it was so established by Parliament, but it is found necessary to improve its proceedings in some respects for the better dispatch of business and expedient also to extend its jurisdiction and powers,'

enacts (in s. 1) that it shall be competent to her Majesty by general or special Order in Council to 'provide for the admission of any appeal or appeals to her Majesty in Council from any judgments, sentences, decrees or orders of any court of justice within any British Colony or Possession abroad.' These Acts, and other later statutes by which the constitution of the Judicial Committee has from time to time been amended, give legislative sanction to the jurisdiction which had previously existed.

Under what authority, then, can a right so established and confirmed be abrogated by the Parliament of Canada? The British North America Act, by section 91, empowered the Dominion Parliament to make laws for the peace, order and good government of Canada in relation to matters not coming within the classes of subjects by that Act assigned exclusively to the Legislatures of the Provinces; and in particular it gave to the Canadian Parliament exclusive legislative authority in respect of 'the criminal law, except the constitution of Courts of criminal jurisdiction, but including the procedure in criminal matters.' But however widely these powers are construed they are confined to action to be taken in the Dominion; and they do not appear to their Lordships to authorise the Dominion Parliament to annul the prerogative right of the King in Council to grant special leave to appeal. Further, by section 2 of the Colonial Laws Validity Act, 1865, it is enacted that

'any Colonial Law which is or shall be in any respect repugnant to the provisions of any Act of Parliament extending to the Colony to which such law may relate, or repugnant to any order or regulation made under the authority of such Act of Parliament or having in the Colony the force and effect of such Act, shall be read subject to such Act, order or regulation, and shall to the extent of such repugnancy but not otherwise, be and remain absolutely void, and inoperative.'

In their Lordships' opinion section 1025 of the Canadian Criminal Code, if and so far as it is intended to prevent the Sovereign in Council from giving effective leave to appeal against an order of a Canadian Court, is repugnant to the Acts of 1833 and 1844 which have been cited, and is therefore void and inoperative by virtue of the Act of 1865. It is true that the Code has received the Royal assent, but that assent cannot give validity to an enactment which is void by Imperial statute. If the prerogative is to be excluded, this must be accomplished by an Imperial Statute; and in fact the modifications which were deemed necessary in respect of Australia and South Africa were effected in that way; see Commonwealth of Australia Act, 1900, s. 74, and Union of South Africa Act, 1909, s. 106."[1] In this connection Viscount Haldane pointed out that although the Act failed as intended to abolish such appeals to the Sovereign in Council altogether for the technical reason that it was not couched in sufficiently precise language to restrict the prerogative, it would be accepted as an indication that Canada wished the granting of leave to appeal to be very restricted and accordingly the Judicial Committee restrict such leave as they would in a unitary state.[2] In another case he, however, said it would be improper in the absence of clear and unmistakable language to construe section 92 of the British North America Act "as permitting the abrogation of any power which the Crown possesses through a person representing it."[3]

Mr. Ewart points out[4] that the Province of Quebec, in

[1] *Per* Cave, L.C., in *Nadan v. The King* (1926), A.C. at 491.
[2] *Hull v. M'Kenna* (1926), I.R. at 407.
[3] *In re Initiative and Referendum Act* (1919), A.C. 935, at 943.
[4] *The Independence Papers*, Vol. 2, No. 2, p. 110.

1914, reversed a judgment of the Judicial Committee [1] and that the decision in the case of *The Bonanza Gold Mining Co. v. The King*,[2] being deemed erroneous, had been put right by statute in several of the Canadian Provinces.

While the foregoing does not pretend to be a complete survey of Canada's legislative steps in this direction, it indicates a tendency to restrict appeals, although indeed such appeals are a little more frequent from Canadian Courts [3] than from the other Dominions because the complexities of her federal system of government are continually creating new problems for solution. The tendency of recent years, as was expressed by Sir Robert Bruce at the Imperial War Conference of 1918, "has been to restrict appeals" and "there is a certain body of opinion in the Dominion which favours its abolition." [4]

§ 49. AUSTRALIA

In Australia a somewhat stronger line in favour of restriction has been taken than in Canada. As noted by the Attorney-General of that Commonwealth the question was a subject of vigorous controversy at the time of the enactment of the Commonwealth Constitution and it has since caused many contests in the Courts, but public interest has died down in proportion, no doubt, as judicial supremacy in Australia became more assured.

"If, however, it were proposed to alter the Constitution, differences of opinion would quickly be manifested. It is not given to many in the community to understand what is the effect of the existing provisions in the Constitution on this subject, but there is no doubt that any attack on these provisions would be strongly resisted." [5]

The framers of the draft of the Australian Constitution sought to exclude the appeal to the Judicial Committee

[1] *Cf.* Professor Berriedale Keith in *Responsible Government in the Dominions*, II at p. 1091.
[2] 1916, 1 A.C. 566.
[3] Corbett and Smith, *Canada and World Politics*, at p. 35.
[4] Corbett and Smith, *Canada and World Politics*, at p. 34.
[5] Hon. J. G. Latham, K.C., *Australia and the British Commonwealth*, at p. 113; see also Quick and Farren on *Constitution of the Commonwealth*, pp. 748 *et seq.*

altogether, but the representations of the Imperial Government prevailed to secure the insertion of a compromise provision by which constitutional questions were reserved to the Australian High Court and which has been used by the Australians gradually to extend this exclusive jurisdiction. Indeed, Australian legislation so effectively extended it as to preclude appeals on such questions from the State Courts to the Judicial Committee. When the subject of appeals was under discussion at the Imperial War Conference of 1918 Mr. William Hughes, the then Prime Minister of the Commonwealth, who had proposed the merger of the Judicial Committee and the House of Lords into one Court of Appeal, expressed the decided opinion that there was no demand in Australia for such a court, but, on the contrary, a "strong demand" which would be carried overwhelmingly on a vote "that there should be no appeal to the Privy Council or to any Imperial Court of Appeal at all." [1]

Australia, like the other Dominions, has a complete system of justice. The High Court consisting of a Chief Justice and four judges is the court of appeal from the Supreme Courts of all the states in the Commonwealth. The Commonwealth of Australia Constitution Act, 1900,[2] by section 73 enacts that the High Court shall have jurisdiction to hear and determine appeals and "the judgment of the High Court in all such cases shall be final and conclusive." This of course negatives an appeal as of right to the Royal prerogative which is dealt with in section 74 in the following terms:

"No appeal shall be permitted to the Queen in Council from a decision of the High Court upon any question, however arising, as to the limits *inter se* of the Constitutional powers of the Commonwealth and those of any state or states, or as to the limits *inter se* of the Constitutional power of any two or more states, unless the High Court shall certify that the question is one which ought to be determined by Her Majesty in Council.

"The High Court may so certify if satisfied that for any special reason the certificate should be granted, and thereupon an appeal shall lie to Her Majesty in Council on the question without further leave.

[1] Proceedings, pp. 151, 152.

[2] 63 & 64 Vic. c. 12.

" Except as provided in this section, this Constitution shall not impair any right which the Queen may be pleased to exercise by virtue of her Royal prerogative to grant special leave to appeal from the High Court to Her Majesty in Council. The Parliament may make laws limiting the matters to which such leave may be asked, but proposed laws containing any such limitations shall be reserved by the Governor-General for Her Majesty's pleasure."

The Australians desired, Mr. Latham says, that no appeal on any constitutional question should lie to the Judicial Committee but were obliged by the Government in Great Britain to compromise by adopting the provisions of section 74.[1]

They have, however, tended to achieve the exclusion of appeals by, on the one hand, so extending the category of *inter se* questions as to cover almost any constitutional question, and on the other by allowing State Supreme Courts to adjudicate on constitutional questions only on condition that any appeal should be to the High Court alone, and then allowing appeals to their own High Court from all orders of a Supreme Court granting leave to appeal to the King in Council. Thus

" the High Court has in recent years . . . taken pains to keep the decision of constitutional questions in its own hands. In doing so it is following the evident general intention of Parliament as disclosed by the amendments made from time to time in the Judiciary Act."

In 1904 the High Court of the Commonwealth of Australia asserted its judicial autonomy by deciding [2] that the principles applicable to the granting by the Judicial Committee of leave to appeal from the High Court or from the Supreme Court were not applicable to the granting of a certificate under section 74 of the Constitution.

In 1906, an appeal [3] was brought direct from the Supreme Court of the State of Victoria to the Judicial Committee and caused considerable trouble. It was an income tax question and the only relevant features to note here are the decision

[1] In *Australia and the British Commonwealth*, at p. 114.
[2] *Deacon v. Webb* (1904), 1 C.L.R. 585.
[3] *Webb v. Outrim* (1907), A.C. 81.

that no restriction on the power of the State Legislature in favour of the appellant was expressly enacted by the Commonwealth Constitution Act, nor could one be implied on any recognised principle of interpretation applicable thereto, and further that a petition by the Commonwealth for a dismissal on the ground of incompetency of an appeal from an order of the State Supreme Court must be dismissed, as the Constitution Act did not authorise the Commonwealth Parliament to take away the right of appeal to the King in Council existing in the case. "The reasoning of their Lordships on the general character of a Federal constitution and especially upon the point of unconstitutional legislation, did not commend itself to anyone in Australia who had paid any attention to the subject involved," [1] and the High Court refused to follow it.

The next year the High Court of Australia, refusing to follow this decision of the judicial committee in *Webb v. Outrim*, decided [2] that the fact that there are conflicting judgments of the High Court and the Privy Council on the same question is not sufficient reason for granting a certificate for leave to appeal to the Privy Council. Further, the High Court held [3] that the fact that a decision of the Privy Council on a question of law as to the limits *inter se* of the constitutional powers of the Commonwealth and the States is contrary to a previous decision of the High Court as to which a certificate under section 74 of the Constitution has been asked and refused, is not of itself a sufficient reason for granting a certificate as to another decision of the High Court following its previous decision.

In 1913 a development occurred which caused great dissatisfaction in Australia. Notwithstanding the growing opinion against appeals to the Judicial Committee the High Court itself took what the Lord Chancellor called the exceptional course of granting [4] a certificate under section 74 of the Constitution giving leave to appeal. The reason it

[1] *Per* Mr. Latham in *Australia and the British Commonwealth*, p. 116.
[2] *Baxter v. Taxation Commissioners* (1907), 4 C.L.R. 1087.
[3] *Flint v. Webb* (1907), 4 C.L.R. 1178.
[4] In the *Colonial Sugar Refining Co., Ltd., v. Attorney-General for the Commonwealth of Australia*, 15 C.L.R. 232; (1914) A.C. 237.

took this exceptional course was apparently that the four judges of the Australian High Court who heard the case were equally divided, and under a statutory power relating to cases in which that court is exercising original jurisdiction the decision was come to by the casting vote of the Chief Justice. The result, however, was unfortunate because

> " the decision of the Judicial Committee of the Privy Council in that case is regarded by many members of the profession in Australia as going beyond the terms of the certificate granted by the High Court, and it cannot be said to be certain that all the observations made in the speech of Lord Haldane in the Privy Council would be accepted as authoritative in Australian Courts." [1]

That very briefly reviews some of the legal steps which the two great non-unitary Dominions have taken to preserve supremacy within the borders of their own courts. As already stated, it does not pretend to be an exhaustive review, but it shows two things—one is the tendency for these two Dominions to avoid and discourage such appeals, and the other is that the ultimate results and effects are not always satisfactory when such appeals are brought. They seem to show that doctrinaire insistence upon a theory, procedure and practice which the nations of the Commonwealth have outgrown may create a position which will make co-operation difficult. If this be the effect in the non-unitary Dominions which by their federal complexity may find some need for an external tribunal, what is to be said of the unitary Dominions which have no such need ? This must be our next enquiry.

[1] *Per* Mr. Latham in *Australia and the British Commonwealth*, p. 115.

CHAPTER VII

LEGISLATIVE AND OTHER EFFORTS TO PRESERVE DOMINION SOVEREIGNTY

(2) BY THE UNITARY DOMINIONS

§ 50. Efforts stronger in the Unitary Dominions.—§ 51. New Zealand.—§ 52. South Africa.—§ 53. The Irish Free State.—§ 54. The Principles of *Hull v. M'Kenna*.—§ 55. Declaration of the Law found by Supreme Court.—§ 56. Adverse Criticism of Declaratory Statute and Reply.—§ 57. An Application for Leave to Appeal Refused.—§ 58. Judicial Committee's Decision not Followed.—§ 59. Another Appeal leads to Amendment of Law.—§ 60. More Criticism of Amendment of Law and Reply.—§ 61. Conflict of Judicial Sovereignty restricts Co-operation.

§ 50. Efforts stronger in the Unitary Dominions

In this matter of judicial sovereignty the Dominions fall easily, as already indicated, into two classes, represented by their respective types of constitution. As Viscount Haldane has wisely pointed out, in non-unitary Dominions such as Canada and Australia, questions may arise between the central Dominion or Commonwealth Government and one of its internal Provinces or States which, though apparently very small when an appeal is admitted, may on discussion turn out to involve serious considerations. In such cases the Judicial Committee has rather freely given leave to appeal, but as has been shown, there are and have been for a long time efforts made even in those non-unitary Dominions to preserve the supremacy of their own Supreme Courts.

It will now be shown that such efforts are even stronger in two of the unitary Dominions, the Union of South Africa and the Irish Free State, the third, New Zealand, having regard to her great distance and the fewness of her appeals, being, apparently, content to let the system of appeals to the Judicial Committee cease from eventual desuetude.

§ 51. New Zealand

New Zealand calls for little comment in this matter. Annexed by Great Britain in 1840, an elective Legislature was established in 1853 [1] and a Ministry responsible to it in 1856, by two Acts of the Imperial Parliament. After a series of Maori wars which ended about 1870, her Government, recognising no subordinate sovereign bodies, became so centralised that by 1876 she became definitely a unitary state, and although she is mentioned in the Commonwealth of Australia Act, 1900,[2] she did not sink her individuality in that Commonwealth, but became as from 26th September 1907 [3] a Dominion. New Zealand has a Supreme Court with a Chief Justice and puisne judges, and from this Supreme Court an appeal lies direct to the Judicial Committee, the appellant's proper course being to apply for leave,[4] but where less than £500 and no questions of general importance are involved leave will be refused.[5] New Zealand has a complete judicial system and she makes little effort to discourage litigants from availing of appeals to the Judicial Committee, but appeals are becoming rarer with the passage of time.

§ 52. South Africa

South Africa is much more independent in this matter of appeals than most of the other Dominions under the relevant Statutes, and consequently the concern of her statesmen in her Dominion status has been in the political phase more than in the judicial, which latter was already hers in effect. They found that there was no need to emphasise the value of their judicial independence which spoke for itself. When General Hertzog, speaking as Prime Minister in the South African House of Assembly before going to the Imperial Conference of 1926,[6] said that " the Dominions are in danger of losing certain of their rights.

[1] New Zealand Constitution Act, 1852 (15 & 16 Vic. c. 72).
[2] 63 & 64 Vic. c. 12.
[3] By Royal Proclamation of 9th September 1907.
[4] *Develin v. Waihi-Silverton Gold Mining Co.* (1902), 16 N.Z.L.R. 191.
[5] *Ridd Milking Machine Co., Ltd., v. Simplex Milk Machine Co., Ltd.* (1914), 33 N.Z.L.R. 1531.
[6] Reported in *The Times* of 29th May 1926.

If that fear is not taken away it will lead in comparatively few years to the destruction of the Empire," he was referring to political rather than judicial status, as is made more clear by his speech made at the opening of that Conference.

"South Africa," he said, "is anxious to possess that will (to live in the Empire) . . . but that can be assured for the future only if she can be made to feel implicit faith in her full and free nationhood upon the basis of equality with every other member of the Commonwealth. That implicit faith she does not possess to-day, but she will possess it the moment her independent national status has ceased to be a matter of dispute and has become internationally recognised. I hope, therefore, that this question of the status of the Dominions, which concerns their own communities no less than the world at large, will receive due consideration by this conference." [1]

Mr. Tielman Roos, the leader of advanced Nationalist thought, no less than General Smuts and General Hertzog in South Africa, and Mr. Mackenzie King equally with Sir Robert Borden in Canada, regarded the Report of the Imperial Conference in 1926 as either epoch-making or epoch-marking in its recognition that in the words of M. Henri Rolin, "Le Statut des Dominions n'est pas autre chose que leur état leur capacité en droit public et en droit international." [2] Status or personality in international law consists in the capacity to exercise rights or to be bound by obligations, but to be effective must also have received recognition in both national and constitutional law and practice and by the great majority if not by all the states which are the subject of international law.[3] This is the happy position which was completed for the Union of South Africa by the Report of the Imperial Conference of 1926. For as already stated she enjoyed autonomy, the protection of which required little care.

In the Union there is a Supreme Court [4] consisting of a Chief Justice of South Africa, the ordinary judges of appeal

[1] Cmd. 2769, p. 25.
[2] *Revue de Droit International et de Legislation Comparée*, 3rd series, Vol. IV, 1923, p. 197.
[3] *Cf.* P. J. Noel Baker, *The Present Juridical Status of the British Dominions in International Law*, p. 137.
[4] Constituted by the South Africa Act, 1909 (9 Edw. VII, c. 9), s. 95, *et seq.*

and the other judges of the several divisions of the Supreme Court of South Africa in the Provinces. The Appellate Division of the Supreme Court consists of the Chief Justice of South Africa, two ordinary judges of appeal and two additional judges of appeal drawn from the Provincial or local division of the Court, their duties in which they continue to perform when not attending in the Appellate Division. The Supreme Courts of the Cape of Good Hope, Natal and the Transvaal and the High Court of the Orange Free State became, on the establishment of the Union, Provincial divisions of the Union Supreme Court. The South Africa Act enacts:

"106. There shall be no appeal from the Supreme Court of South Africa or from any division thereof to the King in Council, but nothing shall be construed to impair any right which the King in Council may be pleased to exercise to grant special leave to appeal from the Appellate Division to the King in Council. Parliament may make laws limiting the matters in respect of which such special leave may be asked, but Bills containing such limitations shall be reserved [1] by the Governor-General for the signification of his Majesty's pleasure.

"Provided that nothing in this section shall affect any right of appeal to his Majesty in Council from any judgment given by the Appellate Division of the Supreme Court under or in virtue of the Colonial Courts of Admiralty Act, 1890."

This clear enactment of the rights of the Union has obviated needless trouble and, whatever discussion [2] may have occurred before that Statute, very few efforts were made to override or set aside the legislation of the Parliament of the Union by appeals to the Judicial Committee, which tribunal indeed declared that taking the general sense of that Dominion into account [3] such appeals have been restricted and that leave to appeal from South Africa would be given only in special circumstances.[4]

[1] As to the proposed abolition of the power of reservation, see Chapter VIII *post.*

[2] *Cf. Re Natal Bishop* (1864), 3 Moo., P.C. (N.S.) 115; *Campbell v. Hall*, 20 State Tr., p. 239; 98 English Reports, 1045. Referred to by Mr. Schlosberg in *The King's Republics*, p. 35.

[3] *Hull v. M'Kenna* (1926), I.R. at p. 405; see also § 29 *ante.*

[4] *Whittaker v. Durban Corporation* (1920), 90 L.J.P.C. 119; 124 L.T. 104; 36 T.L.R. 784 P.C.

§ 53. The Irish Free State

In the Irish Free State the position has been different although it " is a unitary Dominion and is analogous, therefore, to unitary Dominions like South Africa more than it is to non-unitary Dominions like Australia and Canada." [1] It would be expected that the Judicial Committee would, as indeed they said they would, " take the same restrictive view of jurisdiction as we take in the case of a unitary state." [1] They did not however, but on the contrary admitted some appeals which created considerable discussion in the Irish Free State and a regrettable controversy elsewhere which, unfortunately, must be referred to in some detail later.[2]

The Government of the Irish Free State has by its Ministers and by its legislation made clear its objections to efforts to override or set aside the supremacy of its Supreme Court. At the Imperial Conference of 1926, Mr. Kevin O'Higgins, Vice-President of the Executive Council, strongly argued [3] in favour of changing the existing system of appeals to the Judicial Committee, which Mr. Blythe, the present Minister for Finance, has characterised as " a bad, unnecessary and useless court," [4] while Mr. M'Gilligan, the present Minister for External Affairs, in November 1930 declared concerning such appeals " we in Ireland have no intention whatever of allowing this infringement of our sovereignty to continue." [5] Mr. Blythe on the occasion of the enactment of legislation to implement the agreement entered into with the British Government after the decision of *Wigg & Cochrane v. the Attorney-General*, stated that the Irish Government might have been prepared not to fight the question if the Judicial Committee had adhered to the lines

[1] *Per* Lord Haldane in *Hull v. M'Kenna* (1926), I.R. at 406, 407.
[2] § 55. § 56 *post.*
[3] Cmd. 2768 (1926). Mr. Kevin O'Higgins said that, as an inducement to the Irish Free State authorities to admit this system of appeals, " the British Government gave an assurance that its force would be theoretical rather than practical ": *vide The Times*, 20 January 1926.
[4] Dail Proceedings, November 1929.
[5] In a broadcast message to America from London on November 9th during a sitting of the Imperial Conference, 1930.

which were laid down by Viscount Haldane in his judgment in the first case; but they found that they were not going to be treated as South Africa was, because appeals were seldom granted in the case of South Africa and there seemed a disposition on the part of the Judicial Committee to hear appeals frequently and freely from the Free State. He maintained as a result of the constitutional growth since the Treaty, that the effective appeal to the Privy Council was dead and he indicated that, should any decision of the Supreme Court be reversed, the Government would take any steps necessary to make the Committee's decision ineffective pending agreement with the British Government to abolish the whole idea of appeal.[1] Thus, "the general sense" of the Government was evident all along.

In the Irish Free State there is a Supreme Court [2] consisting of the Chief Justice and two other judges of the Supreme Court; a High Court consisting of a President and not more than five ordinary judges; a Court of Criminal Appeal; a Circuit Court consisting originally of not more than eight Circuit Court Judges but added to since; and a District Court consisting originally of not more than thirty-three District Justices.

The Jurisdiction of the Supreme Court is derived from Article 66 of the Constitution [3] of the Irish Free State made in pursuance of the Anglo-Irish Treaty of 6th December 1921, which is as follows:

"66. The Supreme Court of the Irish Free State (Saorstat Eireann) shall, with such exceptions (not including cases which involve questions as to the validity of any law) and subject to such regulations as may be prescribed by law, have appellate jurisdiction from all decisions of the High Court. The decision of the Supreme Court shall in all cases be final and conclusive, and shall not be reviewed or capable of being reviewed by any other Court, Tribunal or Authority whatsoever.

"Provided that nothing in this Constitution shall impair the

[1] Dail Proceedings, November 1929.

[2] Constituted by the Courts of Justice Act, 1924 (No. 10 of 1924).

[3] Professor Berriedale Keith discussing the settlement of the Irish Free State Constitution says, in his *Responsible Government in the Dominions*, at p. 1102: "the appeal was forced by threat of breach of negotiations, and a formal war on the Irish Free State as part of the settlement."

right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave."

Notwithstanding this " general sense " and this legislation tending to restrict such appeals, at least nine petitions for leave to appeal from the Supreme Court of the Irish Free State were presented to the Judicial Committee, but in two only were judgments delivered and neither was effective as will be shown.

§ 54. The Principles of *Hull v. M'Kenna*

On the 25th July 1923, the first four petitions [1] from the Irish Free State appeared in the list when the first was withdrawn and the other three were dismissed after hearing. It was on this occasion that Viscount Haldane laid down the general principles governing appeals from the Dominions which have been referred to so often in the course of this work and which included the doctrine that appeals from the Irish Free State being from a unitary State like South Africa would be very restricted. The reply was, on that occasion made for the appellant, that this doctrine was in contravention of Article 2 of the Treaty to the effect that the status of the Dominion is to be the status of Canada which is a federal Dominion. Article 2 of the Treaty is as follows:

" 2. Subject to the provisions hereinafter set out the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada and the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion shall govern their relationship to the Irish Free State."

Lord Buckmaster, however, answered that this point had not

" any real substance for this reason: that the statute has made it quite plain upon the face of it that, as far as possible, finality and supremacy are to be given to the Irish Courts. All that is

[1] *The King (Bowman) v. Healy; Hull v. M'Kenna; The Freeman's Journal v. Fernstrom;* and *The Freeman's Journal v. Traesliberi;* all in (1926) I.R. at p. 402.

left over is that there is a right to come and supplicate the Sovereign for leave to appeal; and that supplication is always entertained upon the well recognised principles that such a right cannot be invoked unless there are really serious considerations that render it desirable it should be used, and those are applied practically the same everywhere."[1]

This is important because when the same point was some years later made on behalf of another appellant the Judicial Committee took the opposite view[2] and dealt with that argument in this way:

"it will be observed that this proviso (to Article 66) declares 'that nothing in the Constitution shall impair the right of any person to petition His Majesty for special leave to appeal from the Supreme Court to His Majesty in Council or the right of His Majesty to grant such leave,' although these words would appear to be plain and beyond dispute as applied to a case in which such special leave has been duly given, it was contended by the respondents that the proper reading of the words was that nothing should impair the right, *if any*, of any person to petition His Majesty for special leave to appeal, and that there was no right at any time for any person from Ireland so to petition His Majesty in Council. Appeals from Ireland lay to the House of Lords and therefore there was nothing for the proviso to operate upon.

"Their Lordships think that this is a wrong reading of the proviso which is found in the clauses of the Constitution which are to be construed with reference to the Articles of Agreement for a Treaty between Great Britain and Ireland, and therefore with a reference to Article 2 of the Treaty, which provides that the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada and that the law, practice and constitutional usage governing the relationship of the Crown or the representative of the Crown and of the Imperial Parliament to the Dominion of Canada shall govern their relationship to the Irish Free State. Accordingly the proviso specifically ensures that the right to petition His Majesty in Council shall subsist by stipulating that nothing shall impair it."

[1] *Hull v. M'Kenna* (1926), I.R. at p. 409.

[2] See § 59 *post*, where the *Performing Right Society v. Bray Urban District Council* (1930), I.R. at p. 525, is discussed; see also § 30 *ante*.

§ 55. Declaration of the Law found by the Supreme Court

On the 7th December 1925 three more cases from the Irish Free State appeared in the list of the Judicial Committee for leave to appeal which was refused in one case [1] but granted in the other two.[2] Of these latter, one, *Lynham v. Butler*, turned on the construction of a purely domestic Land Act [3] enacted in the Irish Free State in 1923. It contained no point of real importance save to the parties; was not a test case, although perhaps the Judicial Committee did not recognise this; but involved one of those questions "that can be best determined on the spot," [4] arising out of the complex code of Irish land law with which Irish lawyers are peculiarly familiar; not "involving some great principle" [4] or question of "wide public interest." [4] This being so, immediately the Judicial Committee gave leave to appeal the Oireachtas passed a short Act [5] declaring that the Land Act should have, and be deemed always to have had, the construction placed upon it by the High Court and affirmed by the Supreme Court of the Irish Free State. In these circumstances, the appeal was withdrawn by the appellant and never proceeded with. Much unscientific criticism was levelled at this action of the Irish Free State Legislature because it was said it affected pending appeals to the Judicial Committee. The matter gave rise to discussion and controversy, much of which, as is common in such cases, overlooked the real point at issue. It created a political agitation about a subject of purely legal content. The breach of constitutional practice amongst others was committed of discussing

[1] *O'Callaghan v. O'Sullivan* (1925), I.R. 90, and (1926) I.R. 586.

[2] *Lynham v. Butler* (1925), 2 I.R. 231; and *Wigg & Cochrane v. the Attorney-General of the Irish Free State* (1925), I.R. 149; (1927) I.R. 285; (1927) A.C. 674.

[3] The Land Act, 1923 (No. 42 of 1923).

[4] Viscount Haldane in *Hull v. M'Kenna* (1926), I.R. at p. 404.

[5] The Land Act, 1926 (No. 11 of 1926), passed on 11th March 1926. It was introduced by Mr. Kevin O'Higgins, who said that the Privy Council had made "a very clear and definite departure from the undertakings given to Irish Ministers at the time when the draft constitution was the subject of joint consideration," *per The Times*, 20th January 1926.

the matter in Parliament while the appeal was actually pending, and it was subjected to the fullest and most inaccurate public discussion bordering on contempt of court and Parliament; further, the right was assumed not only in public but in Parliament itself to reflect on the actions of the Dominion Government and Parliament. It is gratifying to note that the British Government expressly disowned this glaring breach of international and constitutional practice and did not for a moment countenance what can only be termed this campaign of ignorance.

§ 56. Adverse Criticism of Declaratory Statute and Reply

The case in question having been concluded, it is now permissible to enquire into the facts, although it might seem unnecessary to do so were it not for the bearing, as a constitutional development, which extensive publicity and propaganda have given to it. The pith of the issue may no doubt be stated in various ways, but it can safely be said that the two main points of criticism made against the Irish Free State were that the particular declaratory statute barred in some unconstitutional way an appeal pending before the Judicial Committee, and that it was a piece of *ex post facto* legislation and therefore scientifically wrong. Both points are unsound, as will be shown. It is not unimportant, however, to observe that the manner of the criticism indicated that it had really some undisclosed background, but examining the criticism it was difficult to know what was at issue on the side of the critics. If, on the one hand, the critics believed that by the restriction of such appeals a link of Commonwealth association was in danger of being snapped, they were surely mistaken, because it should be obvious that the enforcing of an unwelcome appeal upon an unwilling Dominion would be wholly repugnant to the constitutional position, to the equality of the Dominions, to the Judicial Committee's principle that "it becomes with the Dominions more and more or less and less as they please," and to the prospects

of Commonwealth amity based on freedom rather than coercion. If, on the other hand, the critics were not actuated by a sincere but mistaken belief that the amity of the Commonwealth was in some way imperilled, the only possible alternative, for we must exclude mere prejudice, seems to be that they had come to regard the Judicial Committee as, in some way, the protector of vested interests, and this cause has not, in fact, been without its champions. It is to be hoped that those who entertained this latter view did not realise its full implication of partiality on the part of the Judicial Committee and its slur on the impartiality of the Supreme Court of the Irish Free State. If such a view has any basis in fact, it would furnish an overwhelming reason for the total abolition of appeals to the Judicial Committee. On the Irish side, however, more real issues were at stake. While admittedly, neither the Irish Free State Government nor the majority of its people favoured the retention of this system of appeals, it is quite inaccurate to allege that there was any unconstitutional bar placed in the way of such appeals or that any *ex post facto* legislation in relation thereto was enacted. It was the merest constitutional right of the Irish Free State that appeals should not be admitted against their wishes. The admission of this particular appeal, however, and its circumstances made it clear that the Judicial Committee would not closely adhere to the principles which it laid down in *Hull v. M'Kenna*,[1] and, therefore, the Dominion took, and was entitled to take, steps to protect its own judicial system from the threatened encroachment upon its autonomy, such an encroachment as had never been attempted in the case of its judicial analogue, South Africa. This is, of course, partly a political consideration and may have furnished the motive for the legislation, but it was not necessarily either the actual or the only motive for it. The discussion of the motive underlying legislation is primarily a question of politics with which we are not concerned. It may, however, be necessary to say that the motive which actuated the passing by the Oireachtas of

[1] See § 54 *et seq. ante.*

this particular piece of legislation is quite irrelevant to the question of its legal and constitutional correctness and validity. Whatever its motive, the action of the Irish Free State in the matter was completely legal and constitutional from first to last, and this statement could have no better or more authoritative endorsement than the words of the Prime Minister of Great Britain who, when asked in November 1929 in the British House of Commons whether until the next Imperial Conference made some alteration in the position as regards the Privy Council, the Treaty obligations of the Irish Free State remained as they were, answered that it was so and added: "I have never experienced from the Irish Free State, any inclination to do anything except observe its honourable undertakings." [1]

Four facts emerge from this controversy. The first is that while all possible motives were attributed to the Oireachtas, the most obvious motive was never suggested, namely, that it might have been moved by a desire simply to confirm or amend the existing law; the second is that it was and is, quite irrespective of motive, the fundamental right of the Oireachtas to confirm or amend the existing law; the third is that the actual legislation did in fact merely confirm and amend the existing law and did not deal with the appeal pending before the Judicial Committee, [2] and the fourth is that the legislation was not *ex post facto*. The Oireachtas as a sovereign legislature, limited only in its powers by reference to the Treaty of 1921, is, like other sovereign legislatures, not bound to accept the law as declared by any tribunal, still less is it bound to have regard to whether its legislation will affect an appeal which may be pending in any place.[3] It is independent of the judiciary and superior to it inasmuch as it can either accept or reject the declared law as it chooses. In the midst of

[1] Mr. Ramsay MacDonald reported in *The Times*, 22nd November 1929.

[2] *Cf.* Professor Keith, who says "attempts to safeguard this appeal are made but inadequately; the essential provision that decisions by the King in Council shall be binding on Irish Courts is omitted and, as Australian precedent shows, cannot be assumed."

[3] *Cf.* the definition of "sovereignty" in Chapter V *ante*.

such frenzied discussion as took place it was, perhaps, inevitable that this most obvious and everyday fact should have been almost overlooked. It would create not the slightest surprise in England if, as indeed sometimes happens, the law as declared in a particular case were amended or altered by an Act of Parliament.[1] Yet the critics of the Irish Free State denied to that Legislature a similar and equally fundamental power, thus denying not only its sovereign character but even any effective power of legislation, and apparently implying that the Oireachtas must accept for all time the law as declared by the Judicial Committee. It was objected, *inter alia*, that the Oireachtas should if at all have declared or amended the law after, and not before, the Judicial Committee had given its decision, but that is based on a wrong view of Dominion Sovereignty. If it was the right of the Oireachtas to pass such legislation after the decision of the Judicial Committee it was equally its right before that decision. It was, however, more than a right; it was the duty of the Legislature to protect its judicial sovereignty immediately it was threatened, as it was when a decision of the Dominion Supreme Court, affirming the Dominion High Court, upon a purely local and individual question of peculiarly local law was admitted for appeal by the Judicial Committee in violation of its own principles laid down only two years previously.[2] Such admission in the circumstances could not have been interpreted otherwise than as a challenge to the judicial autonomy of the Dominion, and not to have indicated this clearly by legislation or otherwise would have amounted to an acquiescence in the unconstitutional attitude taken up by the Judicial Committee in this case. Undoubtedly the action of the Oireachtas was designed to indicate their attitude and wishes in the matter of judicial appeals, and this was entirely within the constitutional practice of the Commonwealth.

[1] *E.g.*, the Trade Union Act, 1913, and *Amalgamated Society of Railway Servants v. Osborne* (1910), A.C. 87; also the Gaming Act, 1835, the Gaming Act, 1922; and *Nicholls v. Evans* (1914), 1 K.B. 118; *Dey v. Mayo* (1920), 2 K.B. 346; *Sutters v. Briggs* (1922), 1 A.C. 1.

[2] *Hull v. M'Kenna* (1926), I.R. 402.

The argument that the declaratory Act was *ex post facto* was also unsound, first because that principle only applies to a declaration that an act is an infringement of law which was not so when committed, and secondly, because the Oireachtas did not disturb any existing rights, but on the contrary actually confirmed the rights which were declared by the Supreme Court to be existing.

§ 57. An Application for Leave to Appeal refused

Within four months [1] after the passing of the declaratory Land Act just mentioned and the abandonment by the appellant of his appeal in *Lynham v. Butler*, another application for special leave to appeal from the Supreme Court of the Irish Free State was made to the Judicial Committee in the case of *Fitzgerald v. The Commissioners of Inland Revenue*,[2] but the Judicial Committee applying the restrictive principles refused to grant leave. This decision accorded, it must be mentioned, with the acknowledged trend of authority and of judicial autonomy in the Dominions.

§ 58. Judicial Committee's Decision not followed

The next important incident arose out of the appeal brought by the plaintiffs in the case of *Wigg & Cochrane v. The Attorney-General of the Irish Free State.* This, raising a big issue concerning the pension rights under Article X of the Anglo-Irish Treaty of 1921 of Civil Servants who retired in consequence of the change of government effected by it, was more the type of case in which, upon the principles laid down by the Judicial Committee, leave to appeal might be given, and accordingly when leave was given, the Attorney-General of the Irish Free State was represented at the hearing. The Judicial Committee reversed the decision of the Irish Free State Supreme Court and reinstated, in effect, the judgment of Mr. Justice Creed Meredith, the judge in the original Irish High Court trial. There were

[1] On 22nd June 1926.

[2] (1926) I.R. 182.

two features in this controversy which affected the carrying into effect of the decision of the Judicial Committee. One was that the issue turned largely not only on the legal construction of the Treaty but also on the actual intention [1] of the high contracting parties to it, apart from its legal effect; the other was an intimation that was given afterwards by three high judicial persons [2] that there had been some misapprehension by the Judicial Committee and that the decision was probably erroneous. In these circumstances the Irish Free State Government took the view that injustice would be done if the decision of the Judicial Committee were followed and refused to follow it.[3] The British Government on the other hand, while accepting the decision of the Judicial Committee (as they could not without inconsistency avoid doing) entered into an agreement with the Irish Free State Government varying Article X to accord with the true intention of the parties to it. Accordingly the extra and uncontemplated liability imposed by the decision of the Judicial Committee on the Irish Free State was undertaken by the British Government. This incident did not enhance the prestige of the Judicial Committee as a final Commonwealth Court of Appeal.

[1] The appeal was heard by the Judicial Committee on the 3rd May 1927 and in February 1928 Mr. Amery, in the House of Commons, is reported in *The Times* of 28th February 1928 as saying, " It was not the intention of those who framed Article X of the Articles of Agreement of 1921 that the Civil Servants in question should be put in a more favourable position in respect of the matters in question than if they had remained in the service of the Crown under the British Government. The manner in which effect should be given to the intention and purpose of the framers of Article X is still under discussion between His Majesty's Governments in Great Britain and the Irish Free State, and I hope to be able to make a further announcement shortly. . . . The Privy Council, obviously, is the only interpreter of the law, but those who framed the Treaty can interpret their own intentions in framing it, and if it should be found to be framed unsatisfactorily they can reconsider the matter."

[2] By Viscount Cave, L.C., Viscount Haldane and Viscount Dunedin, who, with Viscount Finlay, heard and determined the appeal.

[3] " But on equitable grounds it is difficult to see why the Government of the Free State should be obliged to pay compensation on a higher scale than the British Treasury. . . . In the circumstances, therefore, though the authority of the Privy Council's decision cannot be challenged, there does not seem to be any good reason why steps should not be taken to remedy the position by appropriate legislation. For such legislation could not in fairness be deemed to do any party a real injustice." *Vide The Times*, 16th November 1928.

§ 59. Another Appeal leads to Amendment of Law

A further development occurred with the granting of leave to appeal, in the year 1930, of the now celebrated case of the *Performing Right Society v. The Bray Urban District Council*,[1] in connection with which there was further excessive publicity and discussion. The plaintiffs claimed an injunction to restrain the defendants from permitting the public performance of two musical works called "Venus on Earth" and "Lilac Time," in which they claimed copyright, and also damages and consequential relief. The Supreme Court reversed the trial judge, Mr. Justice Johnston, and dismissed the claim of the plaintiffs on the ground that they had no copyright in Saorstat Eireann at the date in question, holding that the Copyright Act of 1911 ceased to apply there when Ireland became a Dominion and that although a later [2] Act in 1927 preserved the rights acquired under the former Act, before the date of the Treaty, the rights of the plaintiffs were not protected, having been acquired after that date.

This decision of the Supreme Court disclosed a gap in the Irish Free State law of Copyright which the Oireachtas took steps by a new statute [3] to correct by protecting the rights of such persons as the plaintiffs, but having regard to a

[1] (1930) I.R. 509.

[2] The Industrial and Commercial Property (Protection) Act (1927) (No. 16 of 1927).

[3] The Copyright (Preservation) Act, 1929 (No. 25 of 1929), sec. 1, enacts: "Every copyright which was subsisting in the late United Kingdom of Great Britain and Ireland on the fifth day of December 1921, under or by virtue of the Copyright Act, 1911, or any order made under that Act, shall (notwithstanding anything contained in the Industrial and Commercial Property (Protection) Act, 1927 (No. 16 of 1927), but subject to the provisions of this Act), subsist and be deemed always to have subsisted in Saorstat Eireann as fully in all respects, whether as to duration, force, effect, limitation, obligation or otherwise howsoever, as the same would have so subsisted if the Copyright Act, 1911, and every Order made thereunder and in force on the fifth day of December 1921, had always been, now were, and hereafter continued to be in full force and effect in Saorstat Eireann."

Sec. 4 enacts: "Notwithstanding anything contained in this Act, no remedy or relief whether by way of damages, injunction, costs, expenses or otherwise shall be recoverable or granted in respect or by reason of an infringement in Saorstat Eireann before the passing of this Act of a copyright by this Act declared to subsist or deemed to have subsisted in Saorstat Eireann."

restriction in Article 43 [1] of the Constitution not enabling them to obtain either an injunction or damages.

This new Copyright Act did not in any way restrict the plaintiffs' right to apply for special leave to appeal to the Judicial Committee, and the plaintiff in fact sought and obtained special leave to appeal to the Judicial Committee. Although the case was clearly of greater public importance than that of *Lynham v. Butler* [2] and involved constitutional questions and other questions of law of some importance, its subject matter was comparatively unimportant, and, further, copyright law is primarily a matter of local jurisdiction which could be, and was in fact, adjusted by the local legislature.

§ 60. More Criticism of Amendment of Law and the Reply

For some reason or another this situation caused another outburst of uninformed criticism and abuse of the Irish Free State Government. In November 1929, Lord Danesfort, from whom one would not expect a breach of constitutional practice, referred to the matter in the House of Lords though the appeal was actually pending and moved the House to resolve

" That this House views with disfavour any attempt by *ex post facto* legislation or otherwise to render nugatory appeal from the Irish Free State Supreme Court to the Privy Council, for which special leave has been given, or to deprive the subject of the benefits of a successful appeal."

Had the motion passed at all, it would have constituted a regrettable departure from the traditions of the House of Lords ; but had it passed in the form proposed its obvious inaccuracies and misrepresentation of the nature of the legislation in question would have reflected as much on the House of Lords as the resolution would have reflected on the Oireachtas. Fortunately this breach of constitutional

[1] The Irish Free State Constitution Article 43 provides " the Oireachtas shall have no power to declare Acts to be infringements of the law which were not so at the date of their commission."

[2] § 55 *ante*.

practice was dealt with on constitutional lines by His Majesty's Secretary of State for the Dominions,[1] who in reply strongly deprecated the bringing forward of a motion criticising the course taken by the Legislature of one of the Dominions and said that this was a matter of principle of some constitutional importance in the relations between the Parliament at Westminster and the Parliaments of the respective Dominions; it was not constitutional for the British Parliament to reflect on the actions of the Irish Free State Parliament any more than it would be constitutional for any of the Parliaments of the Dominions to reflect on the procedure or actions of the Parliament at Westminster; it was not possible to reflect upon the actions of one of the Dominions without injuring the feelings of the other Dominions on that constitutional point; it would not be proper of the House to go behind the act of any Dominion and ascribe intentions and impute motives, whatever justification they might think they had for such actions; the matter of copyright in the Free State was a matter wholly within the competence of the Free State Parliament. Lord Danesfort thereupon withdrew that part of the motion which expressed disapproval of the action of the Free State Government.[2] Outside the House of Lords, the position was even less understood and the most startling mistakes of fact were made. One of the most unexpected but fairly typical of the comment current at the time was the statement which so distinguished a jurist as Professor Keith allowed himself to make, though in his preface and perhaps hurriedly, that the action of the Irish Free State Government had been taken

"to reverse in advance any judgment which the Privy Council might give in the appeal of the Performing Right Society Limited against the decision of the Supreme Court to the effect that the Copyright Act 1911 is not in force in the Free State."[3]

One has only to look at the facts to see that the new Copyright Act did not refer to the Privy Council; did not

[1] Lord Passfield.
[2] *The Times*, November 1929.
[3] Keith, *Sovereignty of the British Dominions*, p. xv.

reverse in advance or otherwise any judgment; was not designed to do so; nor did it affirm but on the contrary rejected the decision of the Supreme Court; but that it did fill a gap in the Irish Free State copyright law; and did declare the law to be as contemplated by the appellants to the Judicial Council, and as the Judicial Council found it to be; that applied to the particular facts, the Act declared that the rights of the appellants, which the Supreme Court had negatived, subsisted and were to be deemed always to have subsisted in the Irish Free State. This restoration and recognition of their rights to the appellants raised, however, the technical difficulty already referred to under Article 43 of the Constitution of the Irish Free State, but for which they would have got not only the favourable declaration but also an injunction and damages.

The Judicial Committee finding in the matter, on hearing the appeal fully, was that the Irish Free State Supreme Court was incorrect in holding that the appellants had not the copyright alleged and therefore that there had been no infringement of the appellants' rights. Yet the Judicial Committee did not discharge the order of the Supreme Court, save as to costs, since full effect had to be given to the Copyright (Preservation) Act, 1929, which was passed after the appellants had obtained special leave to appeal from the judgment of the Supreme Court, that Act, by section 4, providing that no remedy or relief should be granted by reason of an infringement in the Irish Free State before the passing of the Act of a copyright declared by the Act or deemed to have subsisted in the Irish Free State —this section covering the copyright of the said two musical pieces—by virtue of the provisions of section 1 of the Act.

§ 61. Conflict of Judicial Sovereignty restricts Co-operation

Thus inevitable conflict arises between the autonomy, legislative and judicial, of the Dominions and any attempt made by an extra-Dominion tribunal to which they did not consent and which they did not create, or control, to set aside or override their laws. These are the legitimate

efforts of the unitary Dominions to preserve their judicial sovereignty, made on the assumption that, while it is for their own judges to construe their own laws it is not only the right but the paramount duty of their legislatures to protect their sovereignty. It is very important to realise this practice, in which the unitary Dominions are only a little, if at all, in advance of the non-unitary, if the Commonwealth is to continue that friendly co-operation which has characterised its development, especially since the momentous declarations of 1926.

CHAPTER VIII

THE UTILITARIAN OBJECTIONS TO AND INHERENT DEFECTS IN THE JUDICIAL COMMITTEE

§ 62. The Three Classes of Objections to the Judicial Committee.—§ 63. Expense.—§ 64. Delay.—§ 65. Aspersion on Dominion Courts.—§ 66. Discursion on Judicial Temperament.—§ 67. Absence of Local Knowledge.—§ 68. Patriotic Bias; pro-British, anti-Dominion.—§ 69. Class Bias; Money; Landlords and Vested Interests.—§ 70. Replies to Utilitarian Objections.—§ 71. It is an Impartial Tribunal for Provincial Issues.—§ 72. Secures Uniform Interpretation of Law.—§ 73. Upholds Supremacy of Imperial Legislation.—§ 74. Defects in Composition of Judicial Committee.—§ 75. Its Unrepresentative Character.—§ 76. Its Political Tinge.—§ 77. No Dissenting or Supporting Judgments.—§ 78. Not Bound by Precedent.—§ 79. It cannot Enforce its Decisions.—§ 80. Is it a Safeguard for Minorities?—§ 81. It is no Safeguard for Minorities.

§ 62. The Three Classes of Objections to the Judicial Committee

Early in this work it was pointed out that the objections to the exercise of the prerogative of justice on the advice of the Judicial Committee fell into three classes, namely, constitutional, utilitarian and inherent defects of composition.

An attempt has since been made to show, it is hoped satisfactorily, the infringement of Dominion Sovereignty which such exercise constitutes and the legitimate efforts, legislative and otherwise, made by the Dominions to preserve their sovereignty in judicial matters.

It now remains to consider the second and third classes of objections.

§ 63. The Utilitarian Objections: Expense

The first utilitarian objection is that owing to their cost such appeals give the rich an advantage over the poor

suitor whose right may be barred by expense. It is obvious that a succession of appeals through various courts ranging from that of first instance through the primary appeal to the ultimate appeal must enormously increase the expense, and it also reduces the certainty of litigation and thereby enables the wealthy person or corporation by attrition or otherwise to defeat the poor litigant. This feature becomes exaggerated into a gross extravagance imposed upon Dominion nationals who find themselves confronted with the almost equally undesirable alternatives of having either to send their Dominion lawyers to London or to import into the case for the first time English lawyers who, however expert, are unacquainted personally with the earlier history of the particular case and local Dominion law and conditions.

§ 64. Delay

The second utilitarian objection is that the delay inseparable from repeated trials and appeals before successive tribunals tends to defeat justice. Quickness in the determination and finality in the result are two essentials in the adequate administration of any system of law and justice, and looking through the law reports it is obvious that such appeals involve great delay. Not only successive hearings in general but the appeal to the Judicial Committee in particular involving for Dominion litigants, as it does, special preparation through London agents, travellings to and fro and possibly reserved judgment in each court, may place a period of years between the plaintiff's claim for relief and the ultimate decision which has, on occasion, been rendered valueless by the great delay in reaching it.

§ 65. Aspersion on Dominion Courts

The third utilitarian objection is, that the appeal to the Judicial Committee amounts to an aspersion upon the ability or integrity of Dominion appeal courts. The distinguished judges who compose the Judicial Committee would themselves be slow to cast any such aspersion upon the occupants of the Dominion Bench and there occur in the Law Reports many *obiter dicta* expressing the high esteem in which the

members of the Judicial Committee hold many of the Dominion judges whose judgments are brought before them. Notwithstanding this the appeal to the Judicial Committee has been construed as meaning that the Dominion Courts are for one reason or another "unfit to do justice." [1]

§ 66. Discursion on Judicial Temperament

This is not to pay a gratuitous compliment to judges, Dominion or otherwise, where it is undeserved. It is a platitude that the perfect judge is very rare and the perfect court of judges even more so. Each judge, Supreme or otherwise, being merely human at best, has the defects of his qualities resulting mainly from his individual character, training and environment, including his religious and political philosophy and associations. The resulting bias, often unconscious, induced most directly by egotism and other vanities on the one hand and by the influence sometimes almost imperceptible of majority feeling on the other, interferes, where it exists, with the completely impartial discharge of the judicial duties. Vanities, all too human, are not uncommonly seen on the Bench. Some judges, indeed, blinded by the adventitious aids to dignity, by the appropriately and definitely large emoluments and by the security of tenure, can seldom see the facts of their cases with the clear, cold mind of reason and erudition; indeed, these trappings of dignity, these emoluments and this security of tenure have been known at times to conceal the vanity, the spiritual meanness and the intellectual barrenness of an unscrupulous but clever climber who, by the prostitution of religion, politics, or nepotism, has engineered his way from open practice at the Bar into the, for him, haven of the Bench.

Majority influence on the Bench is less obvious, but exists. In a country where there is a predominant majority of one kind or another, religious or political or both, judges, like other persons and institutions, are moulded and influenced, consciously or unconsciously, in their ways of thought and action by it and in its favour. A judge, except he be of

[1] *Per* Professor Berriedale Keith, in *The Outlook*, 5th February 1927.

exceptional character and integrity, who belongs to the majority tends consciously or unconsciously to consider its viewpoint more favourably than any other and to yield to it, and one who belongs to the minority tends in the same direction, seeking consciously or unconsciously to prove his broadminded tolerance and appreciation of the views of the majority. Except, therefore, before judges of rare judicial temperament and integrity, a minority is likely to find difficulties where its issues are at stake; fortunately, no party or religion or Dominion has a monopoly of men of the latter high type.

They are to be found both at the Bar and on the Bench which, complementary to each other, alike render great and useful service to the public and the State. Amongst them are men who regard their practice at the Bar as just as dignified and honourable, but possibly more difficult and laborious, than the administration of justice from the Bench. The practice of the law, both in advice and advocacy, has been proved to develop spiritual integrity, intellectual depth and agility and a deep knowledge of men, nature and the learning of generations which combine in rare measure to make the great advocate and the great judge. For him, trappings and artificialities resume their true perspective, self-assertion and egotism are unnecessary and the vulgarities of vanity have no weight. The greatness of his character, his gifts and his learning ensure that justice is done.

§ 67. Absence of Local Knowledge

The fourth and fifth utilitarian objections are kin and may be taken together. They are that the Judicial Committee's detachment from and defective knowledge of Dominion local conditions make adequate consideration by them of a case impossible or too expensive, and that this also reduces the usefulness and increases the expense of counsel conducting the appeal whether they are from the Dominion concerned or not. Neither the Judicial Committee nor English Counsel can have that adequate knowledge of Dominion local conditions which Dominion judges and counsel have, and even if Dominion counsel be

brought to London, as very often happens, there remains the defective local knowledge of the Judicial Committee who have been known themselves sometimes to express this difficulty, as for instance where the Lord Chancellor said "their Lordships hesitate to differ from judges with the special knowledge of the Australian Constitution which the learned judges of the High Court and not least the Chief Justice and Barton J. possess." [1] The Dominions, it need hardly be said, vary enormously not only in the nature of their purely local law but in the actual basis of their legal systems. This is found even in Great Britain itself where Scottish law is, unlike English, based on the Roman-Dutch system, and a Scottish legal commentator, writing recently on the subject, declared that "the House of Lords as a Supreme Court for Scotland has worked extreme hardship on litigants and has given the law of Scotland a bias quite foreign to its own genius." [2] The great erudition, skill and experience of the distinguished judges who compose the Judicial Committee are beyond question, but it is obviously beyond human power to have, hold and employ the intimate knowledge of local law and conditions requisite for the correct determination of every particular appeal. They have not and could not be expected to have that wide and at the same time intimate knowledge of the law, practice and conditions which only comes from actual practice in the courts of that particular part and close contact with its life. Yet these are universally considered essential for the appointment of even a puisne judge in any particular locality. The Judicial Committee have to consider such different systems as the Roman-Dutch Law—"on this branch of jurisprudence the Privy Council is not specially expert" [3]—and the French Canadian. Even in systems founded on principles of English law, they have to consider the wealth of local statutes, decisions, rules and practice which usually surround even the simplest issues. The

[1] *Per* Viscount Haldane, L.C., in *Attorney-General for the Commonwealth of Australia v. Colonial Sugar Refining Co., Ltd.*, 15 C.L.R. 232; (1914) A.C. at 257.

[2] *Per* Andrew Dewar Gibb in *Scotland in Eclipse*, p. 86.

[3] Keith, *Sovereignty of the British Dominions*, p. 257.

task which is superhuman excites one's pity for the judge who has to attempt it and one's admiration that it is so often accomplished successfully. Nevertheless the failures to cope with the task have been many and have aroused considerable resentment and criticism in the Dominions. This has proved particularly so in the case of questions turning on the constitutions of the Federal Dominions. Mr. William Hughes, at the Imperial War Conference of 1918, characterised the tribunal as "unsatisfactory" and pointed out that there was not a single member intimately familiar with the Australian constitution and he cited a number of unsatisfactory decisions.[1] A similar dissatisfaction exists in Canada.[2] This inherent inability to deal satisfactorily with appeals from the Dominions is not, however, confined to constitutional matters, but extends throughout the whole range of questions with which the Judicial Committee may have to deal and in any one of which it may fall into error. Examples exist in all types of judicial questions. The importance of local conditions is well illustrated in Ireland and Scotland, where even proximity to England and a legislative union of over a century did not prevent considerable differences in law, at certain points, arising. Particularly was this so in the Irish case of *Lynham v. Butler*,[3] already discussed, and to Irish lawyers it seems improbable that the Judicial Committee would have granted leave to appeal in that case had they appreciated that under the niceties of the Irish Land law, a code peculiar to the Irish Free State, the case before it was exceptional and not, as it might have been in England, of any general application. Professor Keith rather understates when he says, "sometimes the Privy Council has ignored local conditions and has misunderstood local law."[4] Even the existence of a few examples, and they are many rather than few, creates a position which, while just cause of complaint in the case of an inferior court, in the case of the final court of appeal for the whole Commonwealth and Empire is intolerable.

[1] Proceedings, p. 137.
[2] See Ewart, *An Imperial Court of Appeal*, pp. 9–13. [3] See § 55 *ante*.
[4] Keith, *Sovereignty of the British Dominions*, p. 258.

The defect is rendered a vice by an unfortunate failing of the Judicial Committee which Professor Keith notes. "It more often," he says, "evades the most vital issues, and decides on some minor point, thus disappointing those who hoped by an expensive appeal at least to obtain general guidance." [1]

§ 68. Patriotic Bias

The sixth utilitarian objection is that where the issue is one between a Dominion and the British Government or between a Dominion person or firm and a British person or firm possible partiality is not entirely negatived. This is based on its composition which is predominantly English and partly political, as will be shown later.[2] It has been said to be inevitable that English lawyers trained in England should have an instinctive and possibly natural leaning in favour of the institutions and policy with which they are best acquainted, and this is particularly so where these lawyers are also, to a greater or less degree, politicians. However little this may actually influence its decisions, the presence of this element in the Judicial Committee is capable of exaggeration and misunderstanding in the Dominions, and it is evidently very undesirable that a body which may have to decide disputes between members of the Commonwealth should be open to even the suspicion of an unconscious bias in favour of a particular member. In such disputes, it is very much in the position of an arbitration court and the fundamental basis of arbitration lies in representation on both sides. This grievance operates very strongly in the Irish Free State, where it is not fully believed that the Treaty of 1921 has dissipated the former antagonism towards that country of some who became members of the Judicial Committee. Even the possibility of the suggestion of political bias in the final court of appeal indicates the necessity of reform. The defect is clearly one which is not necessarily confined to constitutional matters or disputes between members of the Commonwealth, but may find scope in many questions of less importance.

[1] Keith, *Sovereignty of the British Dominions*, p. 258.
[2] See §§ 75 and 76 *post*.

§ 69. Class Bias; Money; Landlords and Vested Interests

Connected with it, and to some extent consequential on it, is the possibility of regarding the Judicial Committee as the representative and protector of either large vested interests or monied interests, particularly in England. This has caused appeals to the Judicial Committee to be regarded, particularly in Australia and Canada, as oppressive to the litigant who is either a Dominion person or firm or a poor person or firm. The weight of this charge is considerably increased by the fact that the British Government has at times appeared to regard the retention of the appeal as a valuable safeguard of the interests of English investors in Dominion securities or undertakings. This point of view was plainly expressed by Mr. Chamberlain when he told the delegates in charge of the Australian Commonwealth Bill that the British Government felt it was its duty to look at the question of appeal " from the point of view of the very large class of persons interested in Australian securities or Australian undertakings who are domiciled in the United Kingdom," and Mr. Duncan Hall says,

" there is little doubt that one of the principal motives which induced the Australian Labour Party in 1918 to add to its General Platform the new clause, ' the Australian High Court to be the Final court of appeal,' was the desire to secure for the Australian people greater equality in matters of justice; and to enable them to exercise a firmer control over the absentee capitalist." [1]

It has also been said that the Judicial Committee safeguards also the landlord class and among the many cases pointed to in support of this popular misapprehension is the recent one of *Lynham v. Butler*,[2] already referred to, which it was erroneously thought would govern the case of a considerable body of Irish landlords, a class representing English capitalist more than Irish interests. The currency of the idea, even though mistaken, that the Judicial

[1] Duncan Hall, *British Commonwealth of Nations*, p. 270, quoting Ewart.
[2] § 55 *ante*.

Committee is in any sense a safeguard of anything but law and justice, would, of course, be repugnant to its sanction as a court at all; that it is a safeguard of sectional interests, geographical or financial, would be fatal to its pretensions to be a Commonwealth Court administering evenhanded justice throughout the whole Commonwealth. The implication from such a safeguard that the Dominions have not and could not be trusted with the right freely to regulate their own affairs; that if they had they would legislate unequally and their courts decide unjustly against such safeguarded interests is another way of saying that "the courts of the Dominion are unfit to do justice." [1] Such a line of thought, it is safe to say, will never lead to that inter-Dominion concord and co-operation without which any common effort, judicial or otherwise, would be impossible.

§ 70. Replies to Utilitarian Objections

Such are the main utilitarian objections. It is important now to consider the points which have been put by way of reply. There have been no adequate or categorical replies to the actual objections as to the denial of justice by expense, delay, ignorance of local law and so on, though there have been, as might be expected, disclaimers of any intentional aspersion on Dominion Courts and of any conscious bias, even though no intentional aspersion or conscious bias was ever laid at the charge of this great and distinguished tribunal. Attempts have been made, on the other hand, to urge, in the words of Professor Keith, that the merits of the present system of appeal to the Judicial Committee are undeniable. It is fair and just to examine the merits which he indicated separately.

§ 71. It is an Impartial Tribunal for Provincial Issues

The first one that "in the vexed issues of Provincial rights especially as regards education and language in Canada, it

[1] Keith, in *The Outlook*, 5th February 1927.

has played the part of an impartial authority, unswayed by political considerations," [1] suggests the regret that no authorities are quoted or even mentioned for this dogmatic assertion; no indication is given as to who is to judge the impartiality; no specific dispute is mentioned; no views of any persons interested as to the undeniable merits of the tribunal are given; nor is there any evidence adduced to support the suggestion that a Canadian tribunal would not be an equally impartial authority in such circumstances. If so, the intervention of the Judicial Committee was unnecessary; if not, the implied aspersion upon Canadian tribunals should be supported by more detailed evidence. In the absence of something more, the rather general eulogy of the present system does not provide a reason why the Judicial Committee should have or exercise a right to override or set aside [2] the law of any autonomous Dominion as declared by its Supreme Court. To assume that the Judicial Committee would decide such vexed issues as education and language in Canada, Australia, South Africa or the Irish Free State impartially and without political bias is not to prove that it should do so *in invitum* the Supreme Court of the Dominion concerned or that it would do so better or more impartially.

§ 72. Secures Uniform Interpretation of Law

The second point which the learned writer makes is that the Judicial Committee

> "helps to secure the uniform interpretation of so much of the Common Law as remains untouched by Dominion reforming zeal and of Statute Law adopted in similar terms in diverse parts of the Empire, such as legislation on marine insurance and negotiable instruments." [3]

It is a little difficult to appreciate the obvious sneer about Dominion reforming zeal as there is no apparent reason why autonomous Dominions should not alter, amend or adapt both the Common Law and Statute Law to suit their own

[1] Keith, *Dominion Autonomy in Practice*, p. 46.
[2] *Cf.* definition of Sovereignty, Chapter V.
[3] Keith, *Dominion Autonomy in Practice*, p. 46.

particular needs; having done so, it seems not only futile and unnecessary but a superhuman task to seek uniformity by interpretation or otherwise. In so much diversity, the construction of each statute by the court administering the system of law of which it is a part would appear to be the appropriate and scientific rule to follow. If, as in each of the Dominions, there are Courts of Justice able to do this in the first instance, and if necessary on appeal, it seems absurd to expect a tribunal like the Judicial Committee, unfamiliar with the local law, to review, affirm, override or set aside the competent Dominion Court. Where uniformity of law is desirable, however, as it undoubtedly is in some matters of a more or less international character, it is best secured by consultation and co-operation and simultaneous legislative action than by the effort of a merely judicial body. For more than a century a common legislative and common final court of appeal functioning in the United Kingdom did not secure uniformity in the laws of England and Ireland and Scotland.

§ 73. Upholds Supremacy of Imperial Legislation

The third and last reason given by Professor Keith for saying that its merits are undeniable is that "it possesses the highest authority on the prerogative of the Crown and it upholds the supremacy of Imperial Legislation over Dominion enactments."[1] This is an anomalous reason to give for such a proposition as neither of these would in themselves give the tribunal merits which it is not proved otherwise by this writer to possess, especially at a period when the function of advising the Sovereign in the exercise of his prerogative of justice, so far as regards the Dominions, has become almost as restricted as the theory of the King's omnipotence.[2] Not only this, but also the Report of the Imperial Conference, 1930,[3] on the operation of Dominion legislation, robs of its point the reference to the supremacy of Imperial Legislation over Dominion enactments, as will

[1] Keith, *Dominion Autonomy in Practice*, p. 46.
[2] *Cf.* Viscount Haldane, L.C., in *M'Kenna v. Hull* (1926), I.R. 408.
[3] Cmd. 3717; see § 102 *post*.

be seen from a perusal of the extract from that Report given in the Appendix.

§ 74. Defects in Composition of the Judicial Committee

It is material now to examine briefly certain defects in the composition of the Judicial Committee in order to see how far they are remediable and to what extent they are inherent in any similar scheme, assuming that the idea of a common court of appeal is not incompatible with the sovereignty of each of the Dominions.

§ 75. Its Unrepresentative Character

As a Commonwealth Court of Final Appeal the Judicial Committee is defective by reason of its unrepresentative character, and also of the character of its actual membership. It is, in its personnel, composed in the main of Englishmen, some of whom have held high judicial office and others of whom have been appointed Lords of Appeal by the Executive of Great Britain. This is certainly remarkable when we remember that the Judicial Committee is the final court of appeal, not for Great Britain, but for the Commonwealth and Empire. It is not, in any sense, representative of the British Commonwealth and still less of the Empire. It is true that this unrepresentative character was early recognised and a remedy was sought to be effected by a series of Statutes commencing in 1895.[1] The effect of these is that any person who is or has been Chief Justice or a judge of one of the superior courts of the Dominions, or their States, or Provinces if a member of the Privy Council, is a member of the Judicial Committee. Thus, any Dominion judge of a court coming within the term of the enactments, if appointed a Privy Councillor, thereupon becomes entitled to sit as a member of the Judicial Committee. Formerly the number of such Dominion judges being members of the Judicial Committee might not exceed seven.[2] This right, however, is wholly illusory since there

[1] Judicial Committee Amendment Act, 1895; Appellate Jurisdiction Acts, 1908, 1913, 1915.

[2] This limit was removed by 18 and 19 Geo. V, c. 26, s. 13.

is no provision made for the payment of such judges and, therefore, they can in actual fact only sit whenever they happen to be in England either at their own expense or that of their Dominion.[1] Those who hold judicial office in the Dominions have their own duties to perform at home, and those who have retired are not likely to wish to undertake, gratuitously, service on the Judicial Committee. In practice these enactments have made no effective alteration in the composition of the Judicial Committee. Remedies are dealt with later,[2] but in passing it may be said that if a common court of appeal is desired, the reconstruction of the Judicial Committee might be considered on the lines of a panel of paid judges chosen from all the members of the Commonwealth or, according to its intended jurisdiction, from the whole Empire; the principle of autonomy would be satisfied either by the entire panel being appointed by the agreement of all the parts of the Empire concerned or by each part nominating its own members; *prima facie*, equality of membership for each part would seem desirable; the constitution of the Court to hear any particular appeal would be a matter of procedure, subject to the requirement of the presence of a minimum number of the members for the part of the Empire from which the appeal came.

§ 76. Its Political Tinge

Such representation would help to lessen some of the evils flowing from the present anomalous character and constitution of the Judicial Committee, and, while the political tinge can rarely be eradicated from judicial appointments, it would ensure a balancing of political leanings in place of the present somewhat one-sided state of affairs. Political influence has played, and probably always will play, a considerable part in the selection of persons for judicial office, both in Great Britain and the Dominions, and this applies equally to the appointment of the members of the Judicial Committee. Undoubtedly the Lords of Appeal in Ordinary are chosen from among the most highly qualified

[1] § 15 *ante*. [2] Chapter X.

and trained judges and members of the Bar, but few can deny the political factor. The idea of a court composed almost exclusively in practice of English lawyers, and hearing appeals not from England but from the Dominions, is, if not inconsistent with Dominion autonomy, at least repugnant to Dominion feeling. The matter, however, goes further and the political character of the Judicial Committee has been crystallised in the enactment creating it. In addition to the Lords of Appeal in Ordinary, the Judicial Committee comprises the Lord Chancellor, the Lord President and the ex-Lords President of the Privy Council. All these are not only lawyers but also politicians, and are either members of the existing Government or have been members of a previous Government. They owe their positions to political services, and, in particular, the Lord Chancellor is a Minister and usually a member of the Cabinet.

§ 77. No Dissenting or Supporting Judgments

Two defects following from the theory that the Judicial Committee is the adviser of the King in Judicial matters may be noted. Since the King cannot act on "divided counsels" it is the settled rule of the Judicial Committee that only one judgment, not necessarily always by the ablest member of the Committee, is delivered in each case. In this Committee, as in other courts, differences of opinion are not unknown and the court has itself on occasion stated that it was not unanimous.[1] Thus the ultimate decision arrived at and the single statement of law agreed on must often represent a compromise between conflicting views. The resulting position is unsatisfactory from a legal point of view, the legislature does not obtain complete guidance and all parties are deprived of the benefit of the full statement of his opinions by each, and often the most distinguished, member of the Committee. The restriction is anachronistic and could be removed without difficulty, since it only rests on the fiction that "advice" is actually tendered to the King.

[1] *Cf.* the practice in American Appellate Courts where valuable minority judgments are delivered.

§ 78. Not Bound by Precedent

A further consequence, apparently, of this fiction is that the Judicial Committee reserves the right of giving advice inconsistent with previous advice in another case or even in the same case. It will reconsider points decided by itself in other cases.[1] It was held that there is no inherent incompetency in its ordering a rehearing of a case already decided by it, even when a question of a right of property is invoked; and that it was not bound to follow the previous decision, pronounced on the hearing of the appeal, although that decision had not been affected by any mistake of fact.[1] In effect, therefore, the Judicial Committee assumes the power not only to overrule its own previous decisions but even to reopen and reconsider a case in which it has given its "final" decision. This is a very wide application of its theoretical function of tendering "advice" to the King and goes far outside the judicial powers of even a final court of appeal. The consequent lack of certainty and finality about any decision of the Judicial Committee is highly unsatisfactory. The assumption of this wide power of review is inconsistent with the Judicial Committee's supposedly strictly judicial character. It is only consistent with the Judicial Committee being in some degree an executive body, and is an abrogation of the powers of the legislature of which alone it is the function to make law. An unsatisfactory state of the law is the appropriate subject for legislative, not judicial, reform.

§ 79. It cannot Enforce its Decisions

Finally, we may note that the Judicial Committee has no machinery of its own for giving effect to its decisions. They depend for their effectiveness on the co-operation of the Dominion judiciary and Government. When embodied in an order in Council they become the decree or order of the final court of appeal in the Dominion and that court has the duty of carrying it into execution, but, if co-operation

[1] *In re Compensation to Civil Servants* under Article X of the Treaty (1929), I.R., p. 44.

is refused, only political pressure or physical force can compel it. It is conceivable that, despite its high prestige, a decision of the Judicial Committee in relation to the affairs of a Dominion may not command as much acceptance as that of the Dominion Courts, and a situation then arises comparable to that in which President Jackson exclaimed in reference to a decision of the federal Supreme Court of the United States: "John Marshall has delivered his judgment; let him enforce it, if he can." In the case of the Irish Free State the Constitution makes no provision for carrying into effect a decision of the Judicial Committee and apparently each decision would require a special statute of the Oireachtas to implement it.

§ 80. Is it a Safeguard for Minorities?

Certain distinguished apologists of the survival of the pre-Commonwealth Judicial Committee in its application to Commonwealth conditions have mistakenly presented it as a safeguard for minorities, religious or otherwise, but chiefly religious. In Canada, Quebec is said to rely on the Privy Council as the best safeguard for her Provincial rights, her language and her religion.[1] In Ireland distinguished Protestant Prelates have claimed it as a security enjoyed by the members of what they truly describe as a vulnerable minority, the abrogation or limitation of which will lead to infringements of their liberty which they would be powerless to withstand.[2]

Not only does this present a very serious aspect of the question, but the dignity and responsibility of those who present it require that it be given the most earnest attention.

The protection of minorities is not one of the matters which naturally comes within the purview of the Judicial Committee or any other court of law, nor which ordinarily, or indeed at all, forms part of its work. The constitution, procedure and practice of the Judicial Committee do not provide for it, nor does such a matter fall within the jurisdiction to advise as to the exercise of the Royal prerogative

[1] *Cf.* Schlosberg in *The King's Republics* at p. 116, quoted at § 8 *ante*.
[2] See § 8 *ante*, where the Archbishop's Protest is quoted.

vested in it under the various Dominion statutes. It is conceivable that a minority of one person, one class, one religion or one party might claim relief against some act of tyranny, oppression or other wrong which could be put into a legal form so as to bring it before a court of law from which in theory at any rate an appeal to the Judicial Committee might lie. On the authorities already discussed earlier in this work,[1] it seems clear that such a case would be either so unimportant that leave to appeal would be refused by the Judicial Committee or so important that, leave to appeal having been granted and decision given in favour of the minority, it could not be enforced against the wishes of the oppressive majority in question.

§ 81. It is no Safeguard for Minorities

There is no doubt that the theoretical right which exists in all the Dominions at present to apply for leave to appeal to the Judicial Committee against certain decisions of corrupt, unjust or ignorant Dominion Supreme Courts, if they exist, is a safeguard, for what it is worth, not only for minorities but for all litigants. To hold it out, however, in any Dominion, if this were done, as an effective or real protection against tyranny by a majority would be, in present circumstances, as untrue as it would be cruel. For such minorities it is merely a theoretical safeguard but nothing better. From the viewpoint of any minority it suffers from several very real and practical defects, as must be already evident from the foregoing chapters. It is very restricted in its exercise and is likely to be more so; if invoked, it is not likely to be exercised in future in defiance of the wishes of any Dominion Government; if exercised, it is not likely to be followed or obeyed by any Dominion Government, whose Supreme Court it might reverse; if exercised, and not followed or obeyed, there is no way—short of physical force, which even is not available to it—of enforcing its decisions; it would thus expose any minority which attempted to use it as a safeguard to the expense and

[1] See § 17 *ante*.

futility of useless litigation, the only result of which might be the further odium of the majority against which relief might be thus sought in vain.

It is, therefore, not a practical safeguard for minorities; it is, on the contrary, a trap for them; it misdirects and confounds their energies and substance; it is, even, a wedge which divides minorities; and, in some cases, it deprives minorities of the measure of political and executive power which they might otherwise reasonably expect to exercise. This is particularly the case where no obvious (though possibly a covert) tyranny or oppression exists to weld the minority together and where a majority government by the expression of good intentions lulls the minority into reliance on their fancied paper safeguard rather than on the influence which would be derived from taking an active part in legislative and executive affairs. Such influence, if intelligently used, might even in certain circumstances present a minority party with a sufficient balance of power to dominate the politics of its Dominion.

It is of course true that the Judicial Committee might conceivably be able by moral suasion or otherwise to make effective its decision in a weak or otherwise amenable Dominion. Or, it is even possible that the tide of development might turn back from autonomy to centralised Imperialism. But all the evidence points the other way and towards restriction to the point of desuetude of the influence of the Judicial Committee in Dominion affairs. It is clear therefore that minorities which have safeguards to seek or claims to make must, to effectuate them, do so either by their own organisation, through the League of Nations, through the Permanent Court of International Justice or through some Commonwealth Tribunal,[1] on the one hand, or, on the other, by taking adequate steps to secure the independence and competence of any Dominion Supreme Court upon which they may be obliged to rely.

[1] *Vide* Chapter X *post.*

CHAPTER IX

JURIDICAL EVOLUTION

§ 82. Juridical Evolution.—§ 83. Before the Dominions Evolved.—§ 84. The Kingdom of Great Britain.—§ 85. The Colonies.—§ 86. South African Colonies and Republic.—§ 87. The Kingdom of Ireland.—§ 88. Juridical Variety.—§ 89. An Imperial Court of Appeal.—§ 90. A Commonwealth Court of Appeal.—§ 91. A Peregrinatory Court of Appeal.—§ 92. Would it Promote Friendly Association?—§ 93. The Judicial Committee's Colonial Jurisdiction.—§ 94. The Wider Juridical Purposes.—§ 95. What will Effect these Wider Purposes?—§ 96. A Real Commonwealth Court.—§ 97. Is a Commonwealth Court Necessary?—§ 98. The Wider Purposes of the Dominions.—§ 99. Independent in International Affairs.—§ 100. Independent in Inter-Dominion Affairs.—§ 101. Independent at Imperial Conferences.—§ 102. Conference as to Principles of Association.—§ 103. Conference on Dominion Legislation.—§ 104. Powers of Disallowance and Reservation not Exercisable.—§ 105. Extra-Territorial Legislation.—§ 106. Colonial Laws Validity Act, 1865.—§ 107. Suggested New Commonwealth Tribunal.—§ 108. Certain Details of the Tribunal agreed.

§ 82. Juridical Evolution

From the foregoing chapters it is evident that the Judicial Committee of the Privy Council is unsuitable for some of the functions which it is now called upon to fulfil. This is made clearer by even a cursory consideration of the needs of the situation which has arisen, mainly from the manner in which, first, the British Empire and, later, the British Commonwealth have evolved. These needs, as indicated at the beginning of this work, create a problem with three aspects—namely, that of litigants in the British Colonies and Dependencies, that of litigants in the Dominions and that concerning inter-Dominion disputes—the solution of which depends on avoiding any conflict between the principles of Dominion autonomy and the practice of Commonwealth association.

For the purpose of discussing a solution, it would be helpful to glance at the evolution of the Colonies and of the Dominions which created this threefold problem.

§ 83. Before the Dominions Evolved

Before the Dominions, as such, existed the Judicial Committee was the final court of appeal from all the courts of the British Empire, except the courts of the United Kingdom of Great Britain and of Ireland, from each of which appeals lay to the appropriate House of Lords. Every colony and dependency from its most newly discovered state with its rough-hewn and developing social and judicial system up to its most highly equipped condition had and has courts of varying degrees of equipment and efficiency from which the ultimate appeal lay at first to the Royal prerogative of justice, and later, within the limits already shown, to the Judicial Committee. All the nations now styled Dominions have not the same history in the matter, nor did all of them appeal to the Privy Council.

§ 84. The Kingdom of Great Britain

Great Britain coming first in the list of the Dominions, includes England with its own Court of Appeal and Court of Criminal Appeal, Scotland with its Court of Session, Commission of Teinds and Court of Exchequer, and Northern Ireland with its Court of Appeal. From all these high appellate tribunals an appeal lies to the House of Lords, but none to the Judicial Committee.

§ 85. The Colonies

Canada, Australia, New Zealand and Newfoundland were originally colonies in each of which an appeal lay from the ordinary courts to the Judicial Committee, representing the fount of justice from which they flowed, so that when with their gradual development an appellate court was established in each they found themselves on the one hand with double appeals, namely, to both their own Supreme Courts and afterwards to the Judicial Committee, and, on the other hand, in some instances, with concurrent or alternative

appeals to either their own Supreme Courts or the Judicial Committee.

§ 86. South African Colonies and Republic

In South Africa, the Provinces which now form the Union formerly ranged in variety from colony, with the colonial judicial features already mentioned, to independent republic with its system of Roman-Dutch law and completely independent judicial systems from which, of course, no appeal lay to the Judicial Committee, and which was apart from express grant in no way connected with the Royal prerogative of justice in British Possessions.[1]

§ 87. The Kingdom of Ireland

In the kingdom of Ireland, then enjoying political unity, which it is hoped will soon again be restored, and then governed under the King by its Lords and Commons, no appeal lay to the Privy Council but to the Irish House of Lords. Since the Union of that Kingdom with the Kingdom of Great Britain, appeals which theretofore were finally decided by the House of Lords of either Kingdom were finally decided by the House of Lords of the United Kingdom,[2] and not by the Privy Council. There is nothing in any statute from the earliest Judicial Committee Act down to the Irish Treaty and Constitution expressly giving the Judicial Committee jurisdiction to hear and determine Irish Appeals; the only *scintilla juris* in the matter being the implication from Article 2 of the Treaty which the Judicial Committee itself has construed in two different ways as already indicated.[3] Thus, inconsistently, Irish Free State appeals, so far as any are brought and admitted, go to the Judicial Committee, while Northern Ireland appeals still go to the House of Lords as heretofore.

[1] *Cf.* South Africa Act, 1909 (9 Ed. VII, c. 9), sec. 106, and the Irish Constitution Act, 1922 (13 Geo. 5, c. 1, sess. 2), Article 66.

[2] The Act for the Union of Great Britain and Ireland (39 and 40 Geo. III, c. 67), Article 8.

[3] See the conflict of construction between *Hull v. M'Kenna* (1926), I.R. at 409, and *Performing Right Society v. Bray U.D.C.* (1930), I.R. at p. 525, discussed at §§ 58 and 59 *ante*.

§ 88. Juridical Variety

From a juridical viewpoint, the Commonwealth is full of variety. Its seven nations

"have very different characteristics, very different histories, and are at very different stages of evolution; while considered as a whole, it defies classification and bears no real resemblance to any other political organisation which now exists or has ever been tried."[1]

All of them, however, having developed highly complex and efficient judicial and political systems, indicate, for the various reasons already stated, that the machinery for appeals provided by the Judicial Committee is not suited to their needs and that the principle of any appeal from their Supreme Courts is not consonant with their wishes.

§ 89. An Imperial Court of Appeal

The proposal of Mr. William Hughes, when Prime Minister of Australia, at the Imperial War Conference of 1918 for a representative Imperial Court of Appeal made as a means of reconciling a conflict of Dominion opinion met with little support and he frankly admitted that the feeling in Australia was against any Imperial Court of Appeal at all.

Even in the special case of Canada the hold of the appeal seems to be the problem of Quebec, one of those minority questions unsuitable for the Judicial Committee.[2]

"The only conclusion it seems safe to draw from this evidence is that the Dominions will not consent to the creation of an Imperial Court of Appeal, and that Dominion appeals to the Judicial Committee are likely before long to cease altogether. There are weighty reasons for believing that such a development would be an advantage rather than a disaster."[3]

§ 90. A Commonwealth Court of Appeal

It is important to enquire if a really representative Commonwealth Court of Final Appeal were to be established

[1] *Cf.* the reference to a constitution for the British Empire in Cmd. 2768.
[2] *Vide* §§ 8, 80 and 81 *ante.*
[3] *Per* Duncan Hall in *British Commonwealth of Nations*, p. 266 (1920).

by remodelling the Judicial Committee or otherwise, (1) what questions it would hear and determine, and (2) what advantages it would possess. The possible questions may be grouped in this way: (*a*) constitutional questions; (*b*) questions involving a special knowledge of Dominion conditions, and (*c*) general questions involving no special knowledge of Dominion conditions.[1] Constitutional questions are regarded by all the Dominions as having so direct a bearing on their national life and development that they, by statute and otherwise, carefully retain the control of such questions themselves; complaints have been made that the Judicial Committee on hearing such appeals from Canada has not displayed the requisite knowledge of constitutional affairs [2]; the Prime Minister of Australia, speaking of the Commonwealth Constitution, said that there was not on the Judicial Committee a "single man who is intimately familiar with this constitutional document" [3]; and two opposite opinions upon an important matter of principle were given by the Judicial Committee within seven years [4] where consistency was not only desirable but essential. Questions involving a special knowledge of Dominion conditions demand for their adequate determination not the mere book knowledge which can be acquired by an extra-territorial tribunal but that intimate knowledge which only a local court can have and which when ignored elicits a refusal in the Dominion concerned to adopt it as of any authority.[5] General questions involving no special knowledge of Dominion conditions could presumably be dealt with as effectively by one court of trained lawyers as another and the balance, therefore, of convenience suggests the local venue.

[1] *Cf.* Duncan Hall, *British Commonwealth of Nations*, p. 268; Ewart, *An Imperial Court of Appeal* (1918), p. 2.

[2] *Cf.* the examples collected by Mr. Ewart, *An Imperial Court of Appeal* (1918), p. 2.

[3] *Proceedings of Imperial Conference*, 1918, p. 137, where instances of unsatisfactory decisions are given.

[4] *Cf.* Chapter VII *ante*. §§ 58 and 59.

[5] *Cf. Baxter's Case*, where the Australian High Court refused to follow the Judicial Committee's decision (1907) (4 C.L.R. 1087); decision in *Webb v. Outrim* (1907), A.C. 81; also *Lynham v. Butler* (1925), 2 I.R. 231; and other cases already mentioned.

This cursory examination of the three types of issues leads to agreement with Mr. Duncan Hall when he says that

" it is impossible to feel that the Dominions would not be a great deal better off and certainly a good deal more content, if they resolved to settle finally for themselves all the questions which now go to the Privy Council for decision." [1]

§ 91. A Peregrinatory Judicial Committee

It is but right to refer to the two points which have long ago been made in favour of the retention of the Judicial Committee's influence in Commonwealth affairs. One is the somewhat amusing one that it, like a vastly exaggerated Assize, should travel from Dominion to Dominion, either whole or in divisions, exercising its great appellate jurisdiction in one Dominion and then passing on by road, rail or sea to the next. There is no hint how the practical difficulties of libraries, registrars and all the concomitants of such a peregrination would be solved; one is left to assume that they also would travel or alternatively there would be a new set in each Dominion. Anything more calculated to destroy *uno ictu* not only the dignity and prestige but also the efficiency of this ancient institution, it would be difficult to conceive.

§ 92. Would it Promote Friendly Association?

The other is a tribute to its archaic tradition as possessing the right to advise as to the exercise of the King's prerogative of justice. It is thought that the Royal symbol will help to perpetuate the unity and friendly association of the autonomous nations which now compose the Commonwealth. It may be so, but it must be admitted that this is far from the function or purpose of a court of justice; further, that it would not be likely to have this effect seems to be evidenced by the fact that its decisions have sometimes though not always caused irritation and estrangement rather than friendly gratitude in the Dominions affected, as was expressed by the Australian delegates in 1900 when they said

[1] *British Commonwealth of Nations* (1920), p. 268.

" the consciousness of kinship, the consciousness of a common blood and a common sense of duty, the pride of their race and history, these are the links of Empire; bands which attach, not bonds that chafe. When the Australian fights for the Empire, he is inspired by those sentiments; but no patriotism was ever inspired or sustained by any thought of the Privy Council."[1]

This was confirmed by the Prime Minister of Australia at the Imperial Conference eighteen years later when he said

" one thing there is a strong demand for, and if a vote on it could be taken, it would be carried overwhelmingly . . . that there should be no appeal to the Privy Council or to any Imperial Court of Appeal to all."[2]

Sir Robert Borden stated that the tendency in Canada " will be to restrict appeals to the Privy Council rather than to increase them,"[3] and another Canadian expressed the opinion for Canada " that our own Courts should be the final authority."[4] It is obvious that the Privy Council is no symbol of unity; effective symbols already exist in the common Kingship and the principle of group action; a symbol which creates dissatisfaction is worse than useless; it is a grave danger to that friendly co-operation of nations which forms the real and only lasting foundation for the Commonwealth.

§ 93. The Judicial Committee's Colonial Jurisdiction

If the Judicial Committee were to discontinue hearing appeals from or otherwise interfering in Commonwealth affairs it would naturally continue to hear and determine those cases from the colonies, dependencies, and so on, by way of litigation or special reference, for which it was originally established.[5] But, it may be asked, if this course be adopted and the Judicial Committee cease to hear Dominion appeals, what is to succeed it? The answer is, it needs no successor, but simply the admission of the supremacy in each Dominion of its own Dominion Supreme Court. This

[1] *Cf.* Duncan Hall, *British Commonwealth of Nations*, p. 266.
[2] *Proceedings*, pp. 151–2. [3] *Ibid.*, p. 143. [4] *Ibid.*, p. 151.
[5] *Cf.* The Judicial Committee Act, 1833; also Chapter III *ante*.

would end the controversy as to its application to the Dominions in a manner consonant with the theory of its origin and with the spirit of Commonwealth development. It would also leave the Judicial Committee free to deal with the purposes for which it was created. With wider Commonwealth purposes it is not properly concerned and it would not be practicable to remodel it or adapt it to deal with them.

§ 94. The Wider Juridical Purposes

Such wider purposes must of necessity and do in fact develop out of the intimate group association of the seven autonomous nations which form the Commonwealth; inter-Dominion disputes of a justiciable kind [1] occur; arbitral questions need solution; uniformity in certain inter-Dominion legislation would be an advantage, *e.g.* naturalisation, copyright, migration, shipping; the legislative, administrative and judicial experience of the whole Commonwealth might helpfully be made the subject of legal research and co-ordination; advisory opinions might be made available in cases presented by the Dominions on their own behalf or on behalf of any of their own nationals whose cases they cared to adopt; and other judicial and advisory purposes of a legal nature might need skilled attention.

§ 95. What will Effect these Wider Purposes?

The question presents itself as to how all the diverse needs, justiciable and advisory, of such a group association can be adequately satisfied. Should they be left according to their nature and kind to the Permanent Court of International Justice or to the League of Nations? [2] Should the Judicial Committee be re-constituted to deal with them? Or should a new tribunal be established for the purpose?

§ 96. A Real Commonwealth Court

The idea of a Commonwealth Court if it be established and, as to its jurisdiction, procedure and practice, con-

[1] *E.g.*, The Labrador Boundary Dispute. The Irish Free State Boundary Dispute. *Wigg and Cochrane v. Attorney-General. The "I'm alone" Case.*
[2] *Cf.* §§ 98–100 *post.*

trolled by free and equal nations, is not incompatible with the full sovereignty of each member State any more than is membership of the League of Nations or adherence to the Permanent Court of International Justice. In this respect the words of one of the distinguished draftsmen of the Covenant of the League of Nations aptly apply to the Commonwealth of Nations if "Commonwealth" be substituted for "League." General Smuts said:

"Looked at in its true light, in the light of the age and the time-honoured ideas and practice of mankind, we are beholding an amazing thing—we are witnessing one of the great miracles of history. . . .

"The League may be a difficult scheme to work, but the significant thing is that the Powers have pledged themselves to work it, that they have agreed to renounce their free choice of action and bound themselves to what amounts in effect to a consultative parliament of the world.

"By the side of that great decision and the enormous step in advance which it means, any small failures to live up to the great decision, any small lapse on the part of the League are trifling indeed. The great choice is made, the great renunciation is over and mankind has, as it were at one bound and in the short space of ten years, jumped from the old order to the new, across a gulf which may yet prove to be the greatest break or divide in human history. . . ."[1]

§ 97. Is a Commonwealth Court Necessary?

But is a Commonwealth Court necessary? There is much to be said on both sides of this question. As against such a Court it may be said that the Commonwealth is in no sense a federal union with subsidiary legislatures and executives; it, therefore, needs no over-riding court to reconcile conflicting laws; it is, on the contrary, an association of sovereign states whose laws are different and whose association is free; to them, as member States, is available the League of Nations; and as adherents, the Court of International Justice. On the other hand, it may be said in favour of such a Court that the member States of the Commonwealth do not stand to each other quite in the

[1] Rhodes' Memorial Lectures at Oxford, 9th November 1929, pp. 111–112.

relation of foreign states; even foreign states bound by Treaty; their relations are more intimate; they have largely a kindred ancestry which distinguishes them from most other inhabitants of the globe; common, though in some ways diverse, traditions, religion, history and law; long, though not always untroubled, association in common, though different, development; and now united by ties more real, for better or worse, than join any two foreign nations, they are freely engaged in co-operative effort. An important consideration is that, on the one hand, the Commonwealth Tribunal would be representative only of the Commonwealth, while, on the other hand, strangers to the Commonwealth would and do in fact participate in the Court of International Justice and the League of Nations.

§ 98. The Wider Purposes of the Dominions

Sentiment plays some but not an excessive part in the determination by the Dominions of the question as to whether the wider purposes referred to can best be served by means of the League of Nations, the Court of International Justice or a new Commonwealth Court. The attitude and acts of the Dominions in international and inter-Dominion affairs indicate to some extent their tendencies.

§ 99. Independent in International Affairs

In international affairs they have taken an independent line. They are all safeguarded by individual membership of the League of Nations and active participation in its work even to the extent of some of them getting seats on the Council; [1] they each signed the Kellogg Pact for the Renunciation of War; they each subscribed to the Statute of the Permanent Court of International Justice, all save the Irish Free State, with the reservation of Commonwealth questions; so that, as no issue can come before the Per-

[1] Great Britain has a permanent seat on the Council of the League; Canada for three years occupied a non-permanent seat on the Council, to which, on expiry of her term, the Irish Free State, the present occupant, was elected.

manent Court of International Justice without the agreement of both parties to it, its jurisdiction is excluded as regards matters arising between members of the Commonwealth.

While it is a fair inference, that all the members of the Commonwealth favour some form of Commonwealth Court, the question is left unsettled as regards the Irish Free State, which is thus not even implicitly committed to a Commonwealth Court in advance.

§ 100. Independent in Inter-Dominion Affairs

In inter-Dominion affairs, each, naturally, has also taken an independent line. To go no farther back than the Imperial Conference of 1926, the declaration, already referred to, was there made that questions affecting judicial appeals should not be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected; that where changes in the existing system were proposed which while primarily affecting one part, raised issues in which other parts also were concerned, such changes ought only to be carried out after consultation and discussion; and the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of the Irish Free State whose delegates, Mr. Kevin O'Higgins, T.D., and Mr. Desmond Fitzgerald, T.D., had been particularly active in dealing with this subject.[1]

§ 101. Independent at Imperial Conference

Attention was at that Conference directed to various issues of considerable complexity in connection with the operation of Dominion legislation which required clarification, and the Conference set forth certain principles which were considered to underlie the whole subject, recognising the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs; that it would not be in accordance with constitutional practice for the Government in the United Kingdom to render advice

[1] Cmd. 2768; see also Appendix *post*.

to His Majesty appertaining to the affairs of a Dominion against the view of the Government of that Dominion; that the appropriate procedure with regard to projected legislation which may affect two Dominions is previous consultation between the Ministers in both; and that legislation by the Parliament of the United Kingdom applying to a Dominion would only be passed with the consent of that Dominion.

§ 102. Conference as to Principles of Association

As, however, there were points arising out of these considerations which required detailed examination, the Conference recommended that a committee be set up to enquire into, report upon and make recommendations concerning existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation; the position as to the competency of the Dominion Parliaments to give their legislation extra-territorial operation; the practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to the provision for the peace, order and good government of the Dominion; the principles embodied in the Colonial Laws Validity Act, 1865,[1] and the extent to which any provisions of that Act ought to be repealed, amended or modified in the light of the existing relations between the various members of the British Commonwealth of Nations.

The Conference recognised that the then existing administrative, legislative and judicial forms were not in accordance with the state of development which the British Commonwealth of Nations and its autonomous members had then reached, a condition of things following inevitably from the fact that most of those forms dated back to a time well antecedent to the present stage of constitutional development.[2]

That ever-growing organism the British Commonwealth

[1] 28 and 29 Vic. c. 63.

[2] *Cf.* Cmd. 3479, p. 7 (1929).

of Nations and its autonomous component parts, continued, during the taking of the important inquiries just mentioned, to grow, and it was just about this period that the legislative and judicial developments indicated in Chapter VII[1] took place.

§ 103. Conference on Dominion Legislation

In January, 1930, the Report of the Conference on the operation of Dominion Legislation and Merchant Shipping [2] was published, and it dealt with three subjects, *inter alia*, which are relevant here.

§ 104. Powers of Disallowance and Reservation not Exercisable

The first includes the powers of disallowance and reservation. The power of disallowance was the power which the Crown had hitherto held, and occasionally exercised, of annulling an Act passed by a Dominion or Colonial Legislature. This power, whatever its origin, found statutory expression in most of the Dominion Constitutions. The New Zealand Constitution Act, 1854,[3] and the British North America Act, 1867,[4] empowered the King in Council to disallow any Act of Parliament of either Dominion within two years from the receipt of the Act from the Governor-General, but he has not done so in New Zealand since 1867 and in Canada since 1873; the Commonwealth of Australia Act, 1900,[5] and the South Africa Act, 1909,[6] empower him to do so within one year after the assent of the Governor-General has been given, but he has never exercised this power there; no such power exists in the Irish Free State; and in Newfoundland the constitution is based on Letters Patent.

The power of reservation means the power of a Governor-General to withhold assent to a Bill passed by a competent

[1] §§ 53 *et seq. ante.*

[2] Cmd. 3479, *q.v.* in the Appendix *post.* A special Sub-Conference of the Imperial Conference, 1926, on Merchant Shipping joined forces with this Committee; hence the title of the Report.

[3] Section 58. [4] Section 56. [5] Section 65.

[6] *Cf.* for discretionary power, New Zealand Constitution Act, 1852, secs. 56, 59; British North America Act, 1867, secs. 55, 57; Commonwealth of Australia Act, 1900, secs. 58, 60; South Africa Act, 1909, secs. 64, 66.

Legislature in order that His Majesty's pleasure may be taken thereon. This power exists in various forms in all the Dominions.[1] The Conference agreed that in the present constitutional position, the power of disallowance can no longer be exercised in relation to Dominion Legislation and recommended that the Dominions concerned should procure amendments to their Constitutions accordingly, and pointed out that it is open to them to procure amendments as to the power of reservation also.

§ 105. Extra-Territorial Legislation

The second matter related to the position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation, and the Conference recommended that in a declaratory statute to be passed by the Parliament at Westminster a clause should be included in the following form:

"It is hereby declared and enacted that the Parliament of a Dominion has full powers to make laws having extra-territorial operation."

§ 106. Colonial Laws Validity Act, 1865

The third matter was the Colonial Laws Validity Act, 1865,[2] which preserved the right of the Imperial Legislature to legislate for a colony, even one with an autonomous legislature, namely a Dominion, and was designed to prevent that colony or Dominion Legislature from enacting any law repugnant to the express law applied to that Colony or Dominion by the Imperial Legislature, the validity of Colonial and Dominion Laws being therefore subject to examination by the Colonial or Dominion Courts, and by the Judicial Committee of the Privy Council.[3] That Con-

[1] For specific reservation of particular subjects; the New Zealand Constitution Act, 1852, sec. 65; the Commonwealth of Australia Act, 1900, sec. 74; South Africa Act, 1909, secs. 25, 64, 85, 106, 151.

[2] 28 and 29 Vic. c. 63; see Appendix *post*.

[3] *Cf. L'Union S. Jacques de Montreal v. Belisle* (1874), L.R. 6 P.C. 31; *Dobie v. Temporalities Board* (1882), 7 A.C. 136 P.C.; *Attorney-General of Ontario v. Attorney-General of the Dominion of Canada* (1894), A.C. 189 P.C.; *Attorney-General of Ontario v. Hamilton Street Railway* (1903), A.C. 524 P.C., *re R. V. Marais, ex parte Marais* (1902), A.C. 51 P.C.

ference therefore recommended that in the statute to be passed by the Parliament at Westminster a clause should be included to the effect that no Statute of the United Kingdom thereafter should extend or be deemed to extend to a Dominion unless it was expressly declared in that Act that the Dominion had requested and consented to the enactment of the particular Statute.

§ 107. Suggested New Commonwealth Tribunal

The recommendation of that Conference which is perhaps most relevant here is one, that is but a suggestion which was offered for further examination by all the Governments, that a new tribunal should be established for the determination of all differences and disputes between members of the Commonwealth; that it should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the Commonwealth, and that it should have a jurisdiction limited to justiciable issues arising between Governments.[1]

§ 108. Certain Details of Tribunal Agreed

The Imperial Conference of 1930 was the next step in the constitutional developments which forms the subject of this work, and by its Report, published in November 1930, it not only approved of the Report of the Conference on the Operation of Dominion Legislation upon the points mentioned, but made certain further definite recommendations with regard to the proposed Commonwealth Tribunal which, naturally forming part of the solution of the problem as to the future settlement of disputes, will be discussed in the next chapter.

[1] Cmd. 3479 (1930), p. 41.

CHAPTER X

SUGGESTED SOLUTIONS OF THE PROBLEM

§ 109. The Threefold Solution.—§ 110. In the Colonies and Dependencies.—§ 111. In the Dominions.—§ 112. Independent Judiciary Essential.—§ 113. Free from Governmental Control.—§ 114. With Security of Tenure.—§ 115. And a Strong Supreme Court.—§ 116. Free from Bias.—§ 117. As to Inter-Dominion Disputes.—§ 118. An ad hoc Commonwealth Tribunal.—§ 119. Of a Voluntary Kind.—§ 120. Its Competence.—§ 121. Its Composition.—§ 122. Conclusion.

§ 109. The Threefold Solution

The threefold problem with regard to justiciable disputes of litigants in the British Colonies and Dependencies and also in the Dominions, on the one hand, and to inter-Dominion disputes on the other, while remaining, as indicated in the previous chapter, unsettled, contains the elements for its own solution under all three heads.

§ 110. In the Colonies and Dependencies

As regards the British Colonies and Dependencies there is no real problem and the statutory jurisdiction of the Judicial Committee of the Privy Council over them remains unaffected, save in so far as it is burdened by additions to its original jurisdiction. Unimpaired and unimpeded by any of the obstacles created by the autonomy of the Dominions, there is no reason why the Judicial Committee should not continue usefully to fulfil the purposes for which it was created by statute as the Supreme Appellate Tribunal of the British Empire.

§ 111. In the Dominions

The question of ultimate appeal in Dominion litigation requires very serious consideration. The fact that Dominion

Sovereignty includes Judicial Sovereignty does not necessarily warrant the fitness of every Dominion Court. It provides an unanswerable reason for the utmost care in the constitution, procedure and practice of every Dominion Supreme Court. Every Dominion citizen is entitled to an assurance that his ultimate Court of Appeal, which is called on to supersede the Judicial Committee of the Privy Council, is independent, fearless and competent; is not subject to any of the objections at present made against appeals to the Judicial Committee on the ground of undue expense, delay, defective knowledge of local law and conditions or bias due to religion, politics or class; and is sufficiently strong in numbers and quality to make its majority judgments conclusive expositions of Dominion law helped by the contrasted opinions of the minority judgments and unvitiated by the compromise statements of law resulting from the single-judgment system adopted in some courts of appeal.

§ 112. Independent Judiciary Essential

As Lord Hewart has recently pointed out, many of the most significant victories for freedom and justice have been won in the Law Courts and the liberties of the citizen are closely bound up with the complete independence of the judges.

"When, for any reason or combination of reasons, it has happened that there has been lack of courage on the Judicial Bench, the enemies of equality before the law have succeeded, and the administration of the law has been brought into disrepute."[1]

§ 113. Free from Governmental Control

The efforts of Executive Governments in earlier times, not entirely unsuccessful, to dilute the fount of justice by appointing appropriately complaisant judges, were met in England by the Act of Settlement, placing the Judges beyond the control of the Executive. The present position in the Dominions with regard to this is not, it is feared,

[1] *The New Despotism*, by the Right Hon. Lord Hewart, L.C.J., at p. 102.

beyond criticism because in most of them the judges are appointed by the Governor-General on the advice of the Executive. It has ever since the Act of Settlement been realised that the law with regard to appointment to any judicial office, however great or small, should be such as to preclude its being made upon religious, political, nepotic, or any considerations other than the courageous fairness and learning of the true judicial temperament. To allow the Executive for the time being to influence, by advice or otherwise, judicial appointment is to make politics a ladder for the ambitious climber and the Bench a haven for the dishonest place-hunter. In some countries the Upper House of the Legislature,[1] and in other countries the head of the Judiciary, have been considered best qualified to advise the head of the State in selecting the ablest and most experienced lawyers to fill judicial office. The State has the advantage, in the former, of the widespread responsibility of the highest deliberative assembly considering the selection and, in the latter, of the specialised responsibility of one who having intimate and continuous knowledge of the legal and other attainments of the members of the profession and holding, as he generally does, office for life, is not only unlikely to be influenced in his choice by such considerations as might conceivably affect appointments made on the advice of a government, but would have every inclination and incentive, as head of the judiciary, to maintain by his choice the highest standard of judicial competence and honour. The invidious position in which the duty of resisting the claims of ambitious politicians places a democratically elected Minister for Justice—even though

[1] *Cf. The American Government*, by Frederic J. Haskin, at p. 285 :
" Receiving appointment from the President upon confirmation by the Senate the nine justices of the Supreme Court pass beyond the power of either except under a process of impeachment in which the House must act as Grand Jury and the Senate as the Court of Impeachment. . . . A justice of the Supreme Court of the United States can be removed for no other cause than ' high crimes and misdemeanors ' which have never been charged against any justice except Samuel Chase, who was impeached in 1804, but who was acquitted by the Senate in 1805. His impeachment grew out of political opinions held and expressed by him and did not involve the integrity of the man. He was, however, also charged with tyrannical conduct in trials under the Alien and Sedition Law."

the responsibility be collectively that of a Government—is evident, and looking back down history one sees the difficulties which even the best of Governments had to avoid selecting judges and law officers on the unsound grounds indicated and to make unquestionable appointments on the grounds of the requisite judicial qualities. Much more can be written on this subject if details of some of the appointments made are to be given.

§ 114. With Security of Tenure

In most of the Dominions a judge is given the same security of tenure and remuneration as English judges have hitherto enjoyed, inasmuch as a judge cannot be removed from office except by the Governor-General in Council on an address from both Houses of Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity, and his remuneration cannot be diminished during his continuance in office. The independent, fearless and competent judge is enabled by this security to adjudicate justly in all circumstances. It is, however, in practice, very little, if any, protection to the litigant against the partisan or dishonest judge who may have attained his judicial position by the prostitution of religion, politics or nepotism. A litigant, or even a body of litigants, such as a minority in any Dominion, discriminated against repeatedly by such a partisan judge, would find it practically impossible, in the first place, to *prove* the judicial misbehaviour or incapacity and, in the second place, to secure a vote of both Houses of Parliament for the removal from office of the offensive judge.

§ 115. And a Strong Supreme Court

Numerical strength is a matter which applies particularly to the Dominion Supreme Court, especially when contrasted with a large Bench like that of the Judicial Committee of the Privy Council, as already indicated,[1] or the United States Supreme Court which consists of nine members.

[1] *Vide* § 15 *ante*.

This numerous Bench while allowing a division of the judicial labours secures a reasonably large attendance of judges on every occasion, without undue delay in the preparation of careful majority and minority judgments,[1] helping the development and elucidation of the law. It is a matter for consideration whether so numerous a Bench of judges would or would not be disproportionate in the Dominions where, however, the Bench is at present numerically much weaker. For instance, the Supreme appellate tribunal consists, in Canada of the Chief Justice and five judges, in Australia of the Chief Justice and four judges, in South Africa of the Chief Justice and four judges, and in the Irish Free State of the Chief Justice and only two judges. So small a Bench involves, in the hearing of cases combined with the preparation of judgments, either overwork on the part of the Bench or inadequate consideration of the issues involved.

§ 116. Free from Bias

A Supreme Court Bench composed entirely of those rare possessors of completely judicial temperament, integrity and erudition, would be open to no further comment than one of astonished praise. In such ideal circumstances it would be unnecessary and improper to suggest that the Bench should be proportioned to the sectional opinions of the Dominion in which it adjudicates. But the circumstances of the Dominions are no more ideally free from class, political

[1] In *The American Government*, by Haskin, at p. 291, a description is given of the procedure adopted by the members of the Supreme Court in conference to arrive at their decision. "After every justice has expressed his opinion as fully as he cares to, the Chief Justice calls the roll of the Court and each member votes upon the question of an adverse or a favourable decision. After this the Chief Justice assigns to the members of the Court the cases upon which they are to write their opinions. Later these opinions are brought in by the members writing them and laid before the whole Court. Here again they argue the case, criticise the opinion and often amend it so much that it has little semblance to its original form. The Court again by roll-call votes upon the question of whether it shall be read as the opinion of the Court or not. If there is a dissenting vote on any case, those who dissent arrange among themselves as to who shall write the dissenting opinion. Sometimes the grounds upon which different justices dissent vary, so that there may be one or more dissenting opinions handed down."

and religious prejudice than any other parts of the world, and even judges yield in a greater or less degree, often without conscious misbehaviour or incapacity, to the influences of their environment. In places, therefore, such as Quebec and the Irish Free State, where religious feeling runs high; it would seem just to arrange that the best aspects of legitimate sectional opinion should be taken into account in making appointments to the Bench, as far as material at the Bar permits in the opinion, not of a political bird-of-passage like a Minister for Justice, but in the opinion of some competent adviser like the head of the judiciary. The Judicial Committee of the Privy Council has been criticised as being unrepresentative of litigants whose cases it heard, but at least it has the merit of being, in the main, outside and detached, possibly too detached, from the controversies it was called on to determine. It would be, indeed, anomalous if its Dominion successor were to leave itself open to the same charge, without being even able to claim the merit of an unbiased detachment.

This, then, is the solution of the problem as to the ultimate determination of Dominion litigation. The judicial sovereignty of each Dominion requires that its Supreme Court should not only be supreme but should *deserve* supremacy by its own intrinsic independent, courageous and competent administration of even-handed justice between all its citizens, whatever be their sectional opinions or affiliations.

§ 117. As to Inter-Dominion Disputes

The last aspect of justiciable disputes relates, not to private litigation, but to disputes between the Dominions *inter se*. The real outstanding question was whether the Dominions, having achieved the attributes of free nationality, should submit disputes *inter se* to some independent tribunal, such as the Permanent Court of International Justice. At the Imperial Conference of 1930, they agreed that it was desirable that such disputes, whenever they arose, should be submitted to some domestic tribunal of an arbitral nature and they passed a series of recommendations,

rather vague and elastic in character, with that object in view. The first was:

"It was agreed that some machinery for the solution of disputes between members of the British Commonwealth is desirable." [1]

There would not be, of course, even a distant analogy between the suggested Tribunal, on the one hand, and the Judicial Committee or any other Court existing in either the British Commonwealth of Nations or the British Empire on the other. The distinctions between them are however worth noting. The Privy Council is an archaic growth and even the Judicial Committee, though statutory, is early nineteenth century; the original purposes of the Privy Council were quite different from its present ones; the original jurisdiction of the Judicial Committee was over Colonies and other dependent possessions beyond the seas; it was pre-Dominion and therefore was not agreed to by them; its jurisdiction was unsuited to their autonomy and was and is resented by them as unsatisfactory, useless and damaging interference; and was limited to ordinary appellate litigation and special reference.

The proposed new tribunal presents features which the Judicial Committee lacks, for it to be a thoroughly modern institution; specially established to meet a particular need; with an original jurisdiction over, and specially adapted to deal with the differences between autonomous nations; which as sovereign states, equal in status, establish it by agreement between themselves; and would share equally in the appointment or election of its judges and the settlement of its jurisdiction, procedure and practice.

§ 118. An *ad hoc* Commonwealth Tribunal

"2. It was agreed, in order to avoid too much rigidity, not to recommend the constitution of a permanent court, but to seek a solution along the line of *ad hoc* proceedings. The Conference thought that this method might be more fruitful than any other in securing the confidence of the Commonwealth." [2]

[1] Cmd. 3717 (1930), p. 23, the relevant parts of which appear in the Appendix. [2] Ibid., p. 23.

The many objections to any Commonwealth Court at all provide reasons for proceeding with great delicacy and care in this experimental matter and it is better to allow the details of the tribunal to evolve from the needs of the Dominions than to wreck it by the imposition of any element of doctrinaire rigidity.

§ 119. Of a Voluntary Kind

"3. The next question considered was whether proceedings should be voluntary or obligatory, in the sense that one party would be under an obligation to submit thereto if the other party wished it. In the absence of general consent to an obligatory system it was decided to recommend the adoption of a voluntary system." [1]

It could hardly have been decided otherwise in consonance with the co-operative principle on which the Commonwealth works and which is one of its strongest links. To decide otherwise would be to risk a breach in the practice of that co-operation by the practical outlawry of any member-state of the Commonwealth which either declined to agree in advance to an obligatory court or declined to submit afterwards to its decision, on having been brought there *in invitum*. The founders of the Court of International Justice, confronted perhaps with a somewhat greater and more difficult task, have sought to attract jurisdiction, support and sanction by voluntary adherence rather than by any obligatory method; it is difficult to see how compulsion could be applied in either case.

§ 120. Its Competence

"4. It was agreed that it was advisable to go further, and to make recommendations as to the competence and composition of an arbitral tribunal, in order to facilitate resort to it by providing for the machinery whereby a tribunal could, in any given case, be brought into existence.

"As to the competence of the tribunal no doubt was entertained that this should be limited to differences between governments. The Conference was also of the opinion that the differences should only be such as are justiciable." [2]

[1] Cmd. 3717, p. 23.

[2] Ibid., p. 23.

This limitation of jurisdiction to differences between Governments arises naturally from the complete and sovereign judicial system which each Dominion possesses. As already shown, the Dominions do not admit the need or desirability of any private litigant seeking a higher or other tribunal than the Dominion Supreme Courts. This express limitation also indicates that the object of the new tribunal is to hear and determine inter-Dominion questions for which no Commonwealth Court existed, unless the Judicial Committee be regarded as suited for that purpose, which *ex hypothesi* it is not.

The limitation of jurisdiction to such differences as are justiciable involves the preliminary enquiry as to what differences are justiciable and what are not and this is by no means a simple question. The distinction between a political question to be settled by war or treaty, i.e. force or negotiation, or both, and a legal question to be settled by a court, i.e. on law and reason, depends not entirely on the formal nature of the question itself but on the action taken by the parties.[1] But a distinguished modern jurist has suggested that a justiciable dispute is one " as to any right or obligation, either under general international law or the terms of any treaty or other international engagement, including a dispute as to any fact relevant to the right or obligation." [2] Most of the controversies likely to arise between the Dominions are justiciable disputes, but it is conceived that in a system where co-operation is the dominant principle amongst admittedly equal sovereign nations a way would be found to hear and determine on their merits any disputes likely to arise without resorting to meticulously technical points about jurisdiction.

Professor Berriedale Keith suggested that the jurisdiction should be limited to

[1] *Cf. Rhode Island v. Massachusetts*, 12 Peters, 657 at 714: " all controversies between nations are in this sense political and not judicial, as none but the Sovereign can settle them. . . . But the States surrendered to Congress and its appointed Court the right and power of settling their mutual controversies, thus making them judicial questions, whether they arose on boundary jurisdiction or any cause whatever," *per* Baldwin, J.

[2] Sir John Fischer Williams, K.C., C.B.E., in *Chapters on Current International Law and League of Nations* (1929), at p. 44.

"definite complaints by one Dominion against another, or by the United Kingdom against a Dominion, or *vice versa*, of injury inflicted upon a British subject belonging to one part of the Empire in some other, under circumstances which, in international law, would afford a cause of claim for damages. The institution of such a form of procedure would only be another recognition of the obvious fact that the position of the self-governing Dominions tends in an ever-increasing degree to be assimilated to that of foreign states, while the choice of tribunal would be a sign of the other essential fact, the real unity of the Empire."[1]

Presumably, the Commonwealth is meant.

It is, however, suggested that here also rigidity is to be avoided and that jurisdiction to arbitrate upon justiciable differences between Governments has the double advantage of being likely to attract such of the Dominions as wish to make any use of the tribunal and at the same time general enough in its terms to admit most of the differences that are likely to arise. There is, however, no express indication that a government would be allowed to follow the desirable and useful course of adopting as its own the case of one of its own nationals, but it is assumed that the jurisdiction is wide enough to permit this to be done.

§ 121. Its Composition

"5. It was agreed that the tribunal should be consulted *ad hoc* for each dispute to be settled and should consist of five citizens of the British Commonwealth of Nations selected:

"(*a*) One by each party to the dispute from the State members of the Commonwealth other than the parties being persons who hold or have held high judicial office or are distinguished jurists and whose names will carry weight throughout the Commonwealth.

"(*b*) One by each party to the dispute from any part of the Commonwealth, with complete freedom of choice.

"(*c*) The members so chosen shall with complete freedom of choice select the Chairman of the tribunal.

"The parties might if they desired bring experts as assessors before the tribunal; each party should bear its own expenses and should bear the expenses of the tribunal equally."

These details of machinery could be adjusted easily between

[1] Keith, *Imperial Unity*, p. 166. *Cf.* p. 388.

the parties by agreement once the principle of any such tribunal at all and the extent of its jurisdiction are admitted. If the members of the tribunal are competent it is a subsidiary though important matter whether there be three or five judges, and for a responsible court of first instance of this kind much can be said for making its quorum five with a view to securing a Tribunal which is strong in numbers and quality. It is just possible on the machinery suggested that the selected members may be equally divided as to the selection of a chairman and so provision should be made for this eventuality.

§ 122. Conclusion

This allocation outlined in this chapter of the threefold problem of the judicial functions under discussion co-ordinates the rights and duties arising, first, from the present development of the British Colonies and Dependencies, whose needs are served by the Judicial Committee; secondly, from the autonomy of the Dominions, whose judicial sovereignty is thus recognised; and, thirdly, from the Commonwealth, the free association in which is preserved.

It follows the trend of constitutional development in all three aspects. The Colonies are left with the advantages of either maintaining the *status quo* or of passing on towards such autonomy as their various stages of development justify; the autonomous nations exercise the judicial independence which their sovereignty requires with the responsibility which rests on all free nations to mete out even-handed justice to their citizens regardless of sectional opinions and interests; the Commonwealth finds a domestic tribunal of a voluntary nature which, without infringing any existing rights, may facilitate co-operation between the Dominions *inter se*.

The spontaneous manner in which international association evolves within the Commonwealth ensures, not only the most vigorous growth of individual national cultures, but their grouping to the greatest national and international advantage. Each adolescent Colony or Dependency tends towards maturity; each responsible Dominion develops

its own spiritual, intellectual, artistic, political, social and economic culture to the enrichment, not only of itself but of the whole world. They begin at home, and by becoming good nationals become better internationals. The fundamental similarities of language, institutions, and laws, being more real between the nations of the Commonwealth than between foreign nations, facilitate the spread of new national ideas, cultures or movements more rapidly through the Commonwealth than through other parts of the world. The cultural value of grouping to the associated nations of the Commonwealth is both a reason for its existence and its strongest link. The fundamental similarities of language, ideas, institutions and laws between the nations of the British Commonwealth and the United States of America—to the extent to which they exist—form more real links between them than between nations where such affinities do not exist. Conversely, no artificial association of nations arranged by governments can be as real or lasting as the voluntary association of peoples. The voluntary element in the threefold solution here submitted is the best guarantee that it accords with the spirit and constitutional development of the autonomous nations which, equal in status, and in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, are freely associated as members of the British Commonwealth of Nations.

APPENDIX I

EXTRACTS FROM THE REPORT OF THE IMPERIAL CONFERENCE 1926

(Cmd. 2768, 1926)

CONTENTS

I. INTRODUCTION

WE were appointed at the meeting of the Imperial Conference on the 25th October, 1926, to investigate all the questions on the Agenda affecting Inter-Imperial Relations. Our discussions on these questions have been long and intricate. We found, on examination, that they involved consideration of fundamental principles affecting the relations of the various parts of the British Empire *inter se*, as well as the relations of each part to foreign countries. For such examination the time at our disposal has been all too short. Yet we hope that we may have laid a foundation on which subsequent Conferences may build.

II. STATUS OF GREAT BRITAIN AND THE DOMINIONS

The Committee are of opinion that nothing would be gained by attempting to lay down a Constitution for the British Empire. Its widely scattered parts have very different characteristics, very different histories, and are at very different stages of evolution; while, considered as a whole, it defies classification and bears no

real resemblance to any other political organisation which now exists or has ever yet been tried.

There is, however, one most important element in it which, from a strictly constitutional point of view, has now, as regards all vital matters, reached its full development—we refer to the group of self-governing communities composed of Great Britain and the Dominions. Their position and mutual relation may be readily defined. *They are autonomous Communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations.*

A foreigner endeavouring to understand the true character of the British Empire by the aid of this formula alone would be tempted to think that it was devised rather to make mutual interference impossible than to make mutual co-operation easy.

Such a criticism, however, completely ignores the historic situation. The rapid evolution of the Oversea Dominions during the last fifty years has involved many complicated adjustments of old political machinery to changing conditions. The tendency towards equality of status was both right and inevitable. Geographical and other conditions made this impossible of attainment by the way of federation. The only alternative was by the way of autonomy; and along this road it has been steadily sought. Every self-governing member of the Empire is now the master of its destiny. In fact, if not always in form, it is subject to no compulsion whatever.

But no account, however accurate, of the negative relations by which Great Britain and the Dominions stand to each other can do more than express a portion of the truth. The British Empire is not founded upon negations. It depends essentially, if not formally, on positive ideals. Free institutions are its life-blood. Free co-operation is its instrument. Peace, security, and progress are among its objects. Aspects of all these great themes have been discussed at the present Conference; excellent results have been thereby obtained. And, though every Dominion is now, and must always remain, the sole judge of the nature and extent of its co-operation, no common cause will, in our opinion, be thereby imperilled.

Equality of status, so far as Britain and the Dominions are concerned, is thus the root principle governing our Inter-Imperial Relations. But the principles of equality and similarity, appropriate to *status*, do not universally extend to function. Here we require something more than immutable dogmas. For example, to deal with questions of diplomacy and questions of defence, we require also flexible machinery—machinery which can, from time to time, be adapted to the changing circumstances

of the world. This subject also has occupied our attention. The rest of this Report will show how we have endeavoured not only to state political theory, but to apply it to our common needs.

III. Special Position of India

It will be noted that in the previous paragraphs we have made no mention of India. Our reason for limiting their scope to Great Britain and the Dominions is that the position of India in the Empire is already defined by the Government of India Act, 1919. We would, nevertheless, recall that by Resolution IX of the Imperial War Conference, 1917, due recognition was given to the important position held by India in the British Commonwealth. Where, in this Report, we have had occasion to consider the position of India, we have made particular reference to it.

IV. Relations Between the Various Parts of the British Empire

Existing administrative, legislative, and judicial forms are admittedly not wholly in accord with the position as described in Section II of this Report. This is inevitable, since most of these forms date back to a time well antecedent to the present stage of constitutional development. Our first task then was to examine these forms with special reference to any cases where the want of adaptation of practice to principle caused, or might be thought to cause, inconvenience in the conduct of Inter-Imperial Relations.

(*a*) *The Title of His Majesty the King.*

The title of His Majesty the King is of special importance and concern to all parts of His Majesty's Dominions. Twice within the last fifty years has the Royal Title been altered to suit changed conditions and constitutional developments.

The present title, which is that proclaimed under the Royal Titles Act of 1901, is as follows:—

> "George V, by the Grace of God, of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

Some time before the Conference met, it had been recognised that this form of title hardly accorded with the altered state of affairs arising from the establishment of the Irish Free State as a Dominion. It had further been ascertained that it would be in accordance with His Majesty's wishes that any recommendation for change should be submitted to him as the result of discussion at the Conference.

We are unanimously of opinion that a slight change is desirable, and we recommend that, subject to His Majesty's approval, the necessary legislative action should be taken to secure that His Majesty's title should henceforward read :—

> " George V, by the Grace of God, of Great Britain, Ireland and the British Dominions beyond the Seas King, Defender of the Faith, Emperor of India."

(*b*) *Position of Governors-General.*

We proceeded to consider whether it was desirable formally to place on record a definition of the position held by the Governor-General[1] as His Majesty's representative in the Dominions. That position, though now generally well recognised, undoubtedly represents a development from an earlier stage when the Governor-General was appointed solely on the advice of His Majesty's Ministers in London and acted also as their representative.

In our opinion it is an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General of a Dominion is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in Great Britain, and that he is not the representative or agent of His Majesty's Government in Great Britain or of any Department of that Government.

It seemed to us to follow that the practice whereby the Governor-General of a Dominion is the formal official channel of communication between His Majesty's Government in Great Britain and His Governments in the Dominions might be regarded as no longer wholly in accordance with the constitutional position of the Governor-General. It was thought that the recognised official channel of communication should be, in future, between Government and Government direct. The representatives of Great Britain readily recognised that the existing procedure might be open to criticism and accepted the proposed change in principle in relation to any of the Dominions which desired it. Details were left for settlement as soon as possible after the Conference had completed its work, but it was recognised by the Committee, as an essential feature of any change or development in the channels of communication, that a Governor-General should be supplied with copies of all documents of importance and in general should be kept as fully informed as is His Majesty the King in Great Britain of Cabinet business and public affairs.

[1] The Governor of Newfoundland is in the same position as the Governor-General of a Dominion.

(*c*) *Operation of Dominion Legislation.*

Our attention was also called to various points in connection with the operation of Dominion legislation, which, it was suggested, required clarification.

The particular points involved were :—

(*a*) The present practice under which Acts of the Dominion Parliaments are sent each year to London, and it is intimated, through the Secretary of State for Dominion Affairs, that " His Majesty will not be advised to exercise his powers of disallowance " with regard to them.

(*b*) The reservation of Dominion legislation, in certain circumstances, for the signification of His Majesty's pleasure which is signified on advice tendered by His Majesty's Government in Great Britain.

(*c*) The difference between the legislative competence of the Parliament at Westminster and of the Dominion Parliaments in that Acts passed by the latter operate, as a general rule, only within the territorial area of the Dominion concerned.

(*d*) The operation of legislation passed by the Parliament at Westminster in relation to the Dominions. In this connection special attention was called to such Statutes as the Colonial Laws Validity Act. It was suggested that in future uniformity of legislation as between Great Britain and the Dominions could best be secured by the enactment of reciprocal Statutes based upon consultation and agreement.

We gave these matters the best consideration possible in the limited time at our disposal, but came to the conclusion that the issues involved were so complex that there would be grave danger in attempting any immediate pronouncement other than a statement of certain principles which, in our opinion, underlie the whole question of the operation of Dominion legislation. We felt that, for the rest, it would be necessary to obtain expert guidance as a preliminary to further consideration by His Majesty's Governments in Great Britain and the Dominions.

On the questions raised with regard to disallowance and reservation of Dominion legislation, it was explained by the Irish Free State representatives that they desired to elucidate the constitutional practice in relation to Canada, since it is provided by Article 2 of the Articles of Agreement for a Treaty of 1921 that " the position of the Irish Free State in relation to the Imperial Parliament and Government and otherwise shall be that of the Dominion of Canada."

On this point we propose that it should be placed on record

that, apart from provisions embodied in constitutions or in specific statutes expressly providing for reservation, it is recognised that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs. Consequently, it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in Great Britain in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

The appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned.

On the question raised with regard to the legislative competence of members of the British Commonwealth of Nations other than Great Britain, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, we think that it should similarly be placed on record that the constitutional practice is that legislation by the Parliament at Westminster applying to a Dominion would only be passed with the consent of the Dominion concerned.

As already indicated, however, we are of opinion that there are points arising out of these considerations, and in the application of these general principles, which will require detailed examination, and we accordingly recommend that steps should be taken by Great Britain and the Dominions to set up a Committee with terms of reference on the following lines :—

"To enquire into, report upon, and make recommendations concerning—

(i) Existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation.

(ii) (*a*) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation.

(*b*) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion.

(iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of the existing

relations between the various members of the British Commonwealth of Nations as described in this Report."

(*d*) *Merchant Shipping Legislation.*

Somewhat similar considerations to those set out above governed our attitude towards a similar, though a special, question raised in relation to Merchant Shipping Legislation. On this subject it was pointed out that, while uniformity of administrative practice was desirable, and indeed essential, as regards the Merchant Shipping Legislation of the various parts of the Empire, it was difficult to reconcile the application, in their present form of certain provisions of the principal Statute relating to Merchant Shipping, *viz.*, the Merchant Shipping Act of 1894, more particularly Clauses 735 and 736, with the constitutional status of the several members of the British Commonwealth of Nations.

In this case also we felt that, although, in the evolution of the British Empire, certain inequalities had been allowed to remain as regards various questions of maritime affairs, it was essential in dealing with these inequalities to consider the practical aspects of the matter. The difficulties in the way of introducing any immediate alterations in the Merchant Shipping Code (which dealt amongst other matters, with the registration of British ships all over the world) were fully appreciated and it was felt to be necessary, in any review of the position, to take into account such matters of general concern as the qualifications for registry as a British ship, the status of British ships in war, the work done by His Majesty's Consuls in the interest of British shipping and seamen, and the question of Naval Courts at foreign ports to deal with crimes and offences on British ships abroad.

We came finally to the conclusion that, following a precedent which had been found useful on previous occasions, the general question of Merchant Shipping Legislation had best be remitted to a special Sub-Conference, which could meet most appropriately at the same time as the Expert Committee, to which reference is made above. We thought that this special Sub-Conference should be invited to advise on the following general lines :—

> " To consider and report on the principles which should govern, in the general interest, the practice and legislation relating to merchant shipping in the various parts of the Empire, having regard to the change in constitutional status and general relations which has occurred since existing laws were enacted."

We took note that the representatives of India particularly desired that India, in view of the importance of her shipping

interests, should be given an opportunity of being represented at the proposed Sub-Conference. We felt that the full representation of India on an equal footing with Great Britain and the Dominions would not only be welcomed, but could very properly be given, due regard being had to the special constitutional position of India as explained in Section III of this Report.

(*e*) *Appeals to the Judicial Committee of the Privy Council.*

Another matter which we discussed, in which a general constitutional principle was raised, concerned the conditions governing appeals from judgments in the Dominions to the Judicial Committee of the Privy Council. From these discussions it became clear that it was no part of the policy of His Majesty's Government in Great Britain that questions affecting judicial appeals should be determined otherwise than in accordance with the wishes of the part of the Empire primarily affected. It was, however, generally recognised that, where changes in the existing system were proposed which, while primarily affecting one part, raised issues in which other parts were also concerned, such changes ought only to be carried out after consultation and discussion.

So far as the work of the Committee was concerned, this general understanding expressed all that was required. The question of some immediate change in the present conditions governing appeals from the Irish Free State was not pressed in relation to the present Conference, though it was made clear that the right was reserved to bring up the matter again at the next Imperial Conference for discussion in relation to the facts of this particular case.

APPENDIX II

EXTRACTS FROM THE REPORT OF THE CONFERENCE ON THE OPERATION OF DOMINION LEGISLATION AND MERCHANT SHIPPING LEGISLATION, 1929

(Cmd. 3479, 1929)

CONTENTS

PART II.—ORIGIN AND PURPOSE OF CONFERENCE

General.

6. The present Conference owes its origin to a recommendation contained in the Report of the Imperial Conference of 1926. The Inter-Imperial Relations Committee of that Conference made a recommendation, which was approved by the full Conference, that a Committee should be set up to examine and report upon certain questions connected with the operation of Dominion legislation, and that a Sub-Conference should be set up simultaneously to deal with merchant shipping legislation. This

recommendation was approved by the Governments concerned, and the present Conference was established to carry out those tasks.

7. The Report of the Imperial Conference of 1926, in addition to setting forth the problems which required further examination, contained first and foremost a statement of the principles regulating the relations of the members of the British Commonwealth of Nations at the present day. It is desirable to recall these principles as they establish the basis and starting-point of the work of the present Conference.

8. The Report of the Imperial Conference declared in relation to the United Kingdom and the Dominions that

> "They are autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic or external affairs, though united by a common allegiance to the Crown, and freely associated as members of the British Commonwealth of Nations."

The Report recognised, however, that existing administrative, legislative and judicial forms were admittedly not wholly in accord with the position as described, a condition of things following inevitably from the fact that most of these forms dated back to a time well antecedent to the present stage of constitutional development.

9. With regard to the position of the Governor-General, it was placed on record in the Report that it was an essential consequence of the equality of status existing among the members of the British Commonwealth of Nations that the Governor-General is the representative of the Crown, holding in all essential respects the same position in relation to the administration of public affairs in the Dominion as is held by His Majesty the King in the United Kingdom, and that he is not the representative or agent of His Majesty's Government in the United Kingdom or of any Department of that Government.

10. With regard to certain points connected with Dominion legislation—disallowance, reservation, the extra-territorial operation of Dominion Laws, and the Colonial Laws Validity Act—the Imperial Conference of 1926, while recognising that there would be grave danger in attempting in the limited time at their disposal any immediate pronouncement in detail on issues of such complexity, set forth certain principles which were considered to underlie the whole subject. As regards disallowance and reservation it was recognised that, apart from provisions embodied in Constitutions or in specific statutes expressly providing for reservation, it is the right of the Government of each Dominion to advise the Crown in all matters relating to its

own affairs; and that consequently it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom in any matter appertaining to the affairs of a Dominion against the view of the Government of that Dominion. It was also suggested that the appropriate procedure with regard to projected legislation in one of the self-governing parts of the Empire which may affect the interests of other self-governing parts is previous consultation between His Majesty's Ministers in the several parts concerned; and it was stated that, with regard to the legislative competence of members of the British Commonwealth of Nations other than the United Kingdom, and in particular to the desirability of those members being enabled to legislate with extra-territorial effect, the constitutional practice is that legislation by the Parliament of the United Kingdom applying to a Dominion would only be passed with the consent of the Dominion concerned.

11. It was, however, considered that there were points arising out of these considerations, and in the application of these general principles, which required detailed examination. In the first place, there remains a considerable body of law passed by the Parliament of the United Kingdom which still applies in relation to the Dominions and at present cannot be repealed or modified by Dominion Parliaments; secondly, under the existing system His Majesty's Government in the United Kingdom retains certain powers with reference to Dominion legislation; and, thirdly, while the parliament of the United Kingdom can legislate with extra-territorial effect, there is doubt as to the powers in this respect of Dominion Parliaments. The Imperial Conference accordingly recommended that steps should be taken by the United Kingdom and the Dominions to set up a Committee with terms of reference on the following lines:—

> "To enquire into, report upon, and make recommendations concerning—
>
> "(i) Existing statutory provisions requiring reservation of Dominion legislation for the assent of His Majesty or authorising the disallowance of such legislation.
>
> "(ii) (*a*) The present position as to the competence of Dominion Parliaments to give their legislation extra-territorial operation.
>
> "(*b*) The practicability and most convenient method of giving effect to the principle that each Dominion Parliament should have power to give extra-territorial operation to its legislation in all cases where such operation is ancillary to provision for the peace, order, and good government of the Dominion.

"(iii) The principles embodied in or underlying the Colonial Laws Validity Act, 1865, and the extent to which any provisions of that Act ought to be repealed, amended, or modified in the light of existing relations between the various members of the British Commonwealth of Nations as described in this Report" (*i.e.*, the Report of the Imperial Conference).

Merchant Shipping. (*Not relevant.*)

Position of India. (*Not relevant.*)

The Questions before the Conference.

15. In approaching the inquiry into the subjects referred to them, the present Conference have not considered it within the terms of their appointment to re-examine the principles upon which the relations of the members of the Commonwealth are now established. These principles of freedom, equality, and co-operation have slowly emerged from the experience of the self-governing communities now constituting that most remarkable and successful experiment in co-operation between free democracies which has ever been developed, the British Commonwealth of Nations; they have been tested under the most trying conditions and have stood that test; they have been given authoritative expression by the Governments represented at the Imperial Conference of 1926; and have been accepted throughout the British Commonwealth. The present Conference have therefore considered their task to be merely that of endeavouring to apply the principles, laid down as directing their labours, to the special cases where law or practice is still inconsistent with those principles, and to report their recommendations as a preliminary to further consideration by His Majesty's Governments in the United Kingdom and in the Dominions.

16. The three heads of the terms of reference to the Conference, apart from the question of Merchant Shipping which is dealt with separately, may be classified briefly as dealing with:—

(i) Disallowance and Reservation;
(ii) The extra-territorial operation of Dominion legislation;
(iii) The Colonial Laws Validity Act, 1865.

17. It seems convenient to give some indication of the origin and nature of the questions which arise in each case, and then to state the recommendations of the Conference under each head.

PART III.—DISALLOWANCE AND RESERVATION

(1) DISALLOWANCE

Present Position.

18. The power of disallowance means the right of the Crown, which has hitherto been exercised (when occasion for its exercise

has arisen) on the advice of Ministers in the United Kingdom, to annul an Act passed by a Dominion or Colonial Legislature.

19. The prerogative or statutory powers of His Majesty the King to disallow laws made by the Parliament of a Dominion, where such powers still subsist, have not been exercised for many years, and it is desirable that the position with regard to disallowance should now be made clear.

20. Whatever the historical origin of the power of disallowance may have been, it has now found a statutory expression in most of the Dominion Constitutions and accordingly the power of disallowance in reference to Dominion legislation exists and is regulated solely by the statutory provisions of those Constitutions.[1]

21. Section 58 of the New Zealand Constitution Act, 1852, and Section 56 of the British North America Act, 1867, empower the King in Council to disallow any Act of the Parliament of either Dominion within a period of two years from the receipt of the Act from the Governor-General. In Section 59 of the Constitution of the Commonwealth of Australia (1900) and Section 65 of the South Africa Act, 1909, the period prescribed is one year after the assent of the Governor-General has been given. The Irish Free State Constitution contains no provision for disallowance.

22. A distinction must, of course, be drawn between the existence of these provisions and their exercise. In the early stages of responsible government cases of disallowance occurred not infrequently merely for the reason that the legislation disallowed did not commend itself on its merits to the Government of the United Kingdom. This practice did not however long survive, for it was realised that under the conditions of self-government the power of disallowance should only be exercised where grave Imperial interests were concerned, and that such intervention was improper with regard to legislation of purely domestic concern. In fact the power of disallowance has not been exercised in relation to Canadian legislation since 1873 or to New Zealand legislation since 1867; it has never been exercised in relation to legislation passed by the Parliaments of the Commonwealth of Australia or the Union of South Africa.

Recommendations.

23. The Conference agree that the present constitutional position is that the power of disallowance can no longer be exercised in relation to Dominion legislation. Accordingly, those Dominions who possess the power to amend their Consti-

[1] NOTE.—This does not apply to Newfoundland where the Constitution is based on Letters Patent and not on Statute.

tutions in this respect can, by following the prescribed procedure, abolish the legal power of disallowance if they so desire. In the case of those Dominions who do not possess this power, it would be in accordance with constitutional practice that, if so requested by the Dominion concerned, the Government of the United Kingdom should ask Parliament to pass the necessary legislation.

Special Position in relation to the Colonial Stock Act, 1900.

24. The special position in relation to the Colonial Stock Act, 1900, may conveniently be dealt with in this place. This Act empowers His Majesty's Treasury in the United Kingdom to make regulations governing the admission of Dominion stocks to the list of trustee securities in the United Kingdom. One of the conditions prescribed by the Treasury which at present govern the admission of such stocks is a requirement that the Dominion Government shall place on record a formal expression of its opinion that any Dominion legislation which appears to the Government of the United Kingdom to alter any of the provisions affecting the stock to the injury of the stockholder or to involve a departure from the original contract in regard to the stock would properly be disallowed. We desire to place on record our opinion, that notwithstanding what has been said in the preceding paragraph, where a Dominion Government has complied with this condition and there is any stock (of either existing or future issues of that Government) which is a trustee security in consequence of such compliance, the right of disallowance in respect of such legislation must remain and can properly be exercised. In this respect alone is there any exception to the position as declared in the preceding paragraph.

25. The general question of the terms on which loans raised by one part of the British Commonwealth should be given the privilege of admission to the Trustee List in another part falls naturally for determination by the Government of the latter, and it is for the other Governments to decide whether they will avail themselves of the privilege on the terms specified. It is right however to point out that the condition regarding disallowance makes it difficult and in one case impossible for certain Dominions to take advantage of the provisions of the Colonial Stock Act, 1900.

(2) RESERVATION

Present Position.

26. Reservation means the withholding of assent by a Governor-General or Governor to a Bill duly passed by the competent Legislature in order that His Majesty's pleasure may be taken thereon.

27. Statutory provisions dealing with reservation of Bills passed by Dominion Parliaments may be divided into (1) those which confer on the Governor-General a discretionary power of reservation and (2) those which specifically oblige the Governor-General to reserve Bills dealing with particular subjects.

28. The discretionary power of reservation is dealt with in Sections 56 and 59 of the New Zealand Constitution Act, 1852, Sections 55 and 57 of the British North America Act, 1867, Sections 58 and 60 of the Constitution of the Commonwealth of Australia (1900), Sections 64 and 66 of the South Africa Act, 1909, and Article 41 of the Constitution of the Irish Free State.

29. Provisions requiring Bills relating to particular subjects to be reserved by the Governor-General for the signification of His Majesty's pleasure exist in the Australian, New Zealand, and South African Constitutions. By Section 65 of the New Zealand Constitution Act, 1852, the General Assembly of New Zealand is given power to alter the sums allocated by the Schedule to the Act for the Governor's salary, the Judges, the establishment of the general government and native purposes respectively, but any Bill altering the salary of the Governor or the sum allocated to native purposes must be reserved. By Section 74 of the Constitution of the Commonwealth of Australia (1900), it is provided that the Commonwealth Parliament may make laws limiting the matters in which special leave to appeal from the High Court of Australia to His Majesty in Council may be asked, but proposed laws containing any such limitation shall be reserved by the Governor-General for the signification of His Majesty's pleasure. The South Africa Act, 1909, contains three sections relating to the reservation of Bills dealing with particular subjects. Section 106 contains provisions similar to those in Section 74 of the Constitution of the Commonwealth of Australia. Section 64 provides that all Bills repealing or amending that section or any of the provisions of Chapter IV of the Act under the heading "House of Assembly" and all Bills abolishing provincial councils or abridging the powers conferred on them under Section 85 shall be reserved. By paragraph 25 of the Schedule to the Act, which lays down the terms and conditions on which the Governor in Council may undertake the government of native territories if transferred to the Union under Section 151, it is provided that all Bills to amend or alter the provisions of this Schedule shall be reserved. There is no provision requiring reservation in either the Canadian or Irish Free State Constitutions.

30. Provisions relating to compulsory reservation are also to be found in the Colonial Courts of Admiralty Act, 1890, and in the Merchant Shipping Act, 1894. These provisions are dealt with in another section of this Report.

31. The power of reservation had its origin in the instructions given by the Crown to the Governor of a Colony as to the exercise by him of the power to assent to Bills passed by the colonial legislative body. It has been embodied in one form or another in the Constitutions of all the Dominions and may be regarded in their case as a statutory and not a prerogative power. Its exercise has involved the intervention of the Government of the United Kingdom at three stages,—in the instructions to the Governor concerning the classes of Bills to be reserved, in the advice tendered to the Crown regarding the giving or withholding assent to Bills actually reserved, and in the forms in use for signifying the Royal pleasure upon a reserved Bill. Reservation found a place naturally enough in the older colonial system under which the Crown exercised supervision over the whole legislation and administration of a Colony through Ministers in the United Kingdom. In the earlier stages of self-government supervision over legislation did not at once disappear, but it was exercised in a constantly narrowing field with the development of the principles and practice of responsible government. As regards the Dominions, it gradually came to be realised that the attainment of the purposes of reservation must be sought in other ways than through the use of powers by the Government of the United Kingdom. The present constitutional position is set forth in the statement of principles governing the relations of the United Kingdom and the Dominions contained in the Report of the Imperial Conference of 1926; and we have to apply these principles to the power of reservation and its exercise in the conditions now established.

RECOMMENDATIONS

Discretionary Reservation.

32. Applying the principles laid down in the Imperial Conference Report of 1926, it is established first that the power of discretionary reservation if exercised at all can only be exercised in accordance with the constitutional practice in the Dominion governing the exercise of the powers of the Governor-General; secondly, that His Majesty's Government in the United Kingdom will not advise His Majesty the King to give the Governor-General any instructions to reserve Bills presented to him for assent, and thirdly, as regards the signification of the King's pleasure concerning a reserved Bill, that it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom against the views of the Government of the Dominion concerned.

Compulsory Reservation—Principle Governing the Signification of the King's Pleasure.

33. In cases where there is a special provision requiring the reservation of Bills dealing with particular subjects, the position would in general fall within the scope of the doctrine that it is the right of the Government of each Dominion to advise the Crown in all matters relating to its own affairs and that consequently it would not be in accordance with constitutional practice for advice to be tendered to His Majesty by His Majesty's Government in the United Kingdom in any matter appertaining to the affairs of a Dominion against the views of the Government of that Dominion.

34. The same principle applies to cases where alterations of a Constitution are required to be reserved.

Abolition of the Power of Reservation (Discretionary or Compulsory).

35. As regards the continued existence of the power of reservation, certain Dominions possess the power by amending their Constitutions to abolish the discretionary power and to repeal any provisions requiring reservation of Bills dealing with particular subjects, and it is, therefore, open to those Dominions to take the prescribed steps to that end if they so desire.

36. As regards Dominions that need the co-operation of the Parliament of the United Kingdom in order to amend the provisions in their Constitutions relating to reservation, we desire to place on record our opinion that it would be in accordance with constitutional practice that if so requested by the Dominion concerned the Government of the United Kingdom should ask Parliament to pass the necessary legislation.

PART IV.—THE EXTRA-TERRITORIAL OPERATION OF DOMINION LEGISLATION

THE PRESENT POSITION AS TO THE COMPETENCE OF DOMINION PARLIAMENTS TO GIVE THEIR LEGISLATION EXTRA-TERRITORIAL OPERATION.

37. In the case of all Legislatures territorial limitations upon the operation of legislation are familiar in practice. They arise from the express terms of statutes or from rules of construction applied by the Courts as to the presumed intention of the Legislature, regard being had to the comity of nations and other considerations. But in the case of the legislation of Dominion Parliaments there is also an indefinite range in which the limitations may exist not merely as rules of interpretation but as constitutional limitations. So far as these constitutional limitations exist there is a radical difference between the position of

Acts of the Parliament of the United Kingdom in the United Kingdom itself and Acts of a Dominion Parliament in the Dominion.

38. The subject is full of obscurity and there is conflict in legal opinion as expressed in the Courts and in the writings of jurists both as to the existence of the limitation itself and as to its extent. There are differences in Dominion Constitutions themselves which are reflected in legal opinion in those Dominions. The doctrine of limitation is the subject of no certain test applicable to all cases, and constitutional power over the same matter may depend on whether the subject is one of a civil remedy or of criminal jurisdiction. The practical inconvenience of the doctrine is by no means to be measured by the number of cases in which legislation has been held to be invalid or inoperative. It introduces a general uncertainty which can be illustrated by questions raised concerning fisheries, taxation, shipping, air navigation, marriage, criminal law, deportation, and the enforcement of laws against smuggling and unlawful immigration. The state of the law has compelled Legislatures to resort to indirect methods of reaching conduct which, in virtue of the doctrine, might lie beyond their direct power but which they deem it essential to control as part of their self-government.

39. It would not seem to be possible in the present state of the authorities to come to definite conclusions regarding the competence of Dominion Parliaments to give their legislation extra-territorial operation; and, in any case, uncertainty as to the existence and extent of the doctrine renders it desirable that legislation should be passed by the Parliament of the United Kingdom making it clear that this constitutional limitation does not exist.

RECOMMENDATIONS

40. We are agreed that the most suitable method of placing the matter beyond possibility of doubt would be by means of a declaratory enactment in the terms set out below passed, with the consent of all the Dominions, by the Parliament of the United Kingdom.

41. With regard to the extent of the power so to be declared, we are of opinion that the recognition of the powers of a Dominion to legislate with extra-territorial effect should not be limited either by reference to any particular class of persons (*e.g.*, the citizens of the Dominion) or by any reference to laws "ancillary to provision for the peace, order and good government of the Dominion" (which is the phrase appearing in the terms of reference to the Conference).

42. We regard the first limitation as undesirable in principle. With respect to the second, we think that the introduction of a

reference to legislation ancillary to peace, order and good government is unnecessary, would add to the existing confusion on the matter, and might diminish the scope of the powers the existence of which it is desired to recognise.

43. After careful consideration of possible alternatives, we recommend that the clause should be in the following form :—

> *"It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation."*

44. In connection with the exercise of extra-territorial legislative powers, we consider that provision should be made for the customary extra-territorial immunities with regard to internal discipline enjoyed by the armed forces of one Government when present in the territory of another Government with the consent of the latter. Such an arrangement would be of mutual advantage and common convenience to all parts of the Commonwealth, and we recommend that provision should be made by each member of the Commonwealth to give effect to such customary extra-territorial immunities within its territory as regards other members of the Commonwealth.

PART V.—COLONIAL LAWS VALIDITY ACT

PRESENT POSITION

45. The circumstances in which the Colonial Laws Validity Act, 1865, came to be enacted [1] are so well known that only a brief reference to them is necessary in this Report.

46. From an early stage in the history of Colonial development the theory had been held that there was a common law rule that legislation by a Colonial Legislature was void if repugnant to the law of England. This rule was apparently based on the assumption that there were certain fundamental principles of English law which no Colonial law could violate, but the scope of these principles was by no means clearly defined.

47. A series of decisions, however, given by the Supreme Court of South Australia in the middle of the nineteenth century applied the rule so as to invalidate several of the Acts of the Legislature of that Colony. It was soon realised that, if this interpretation of the law were sound, responsible Government, then recently established by the release of the Australian Colonies from external political control, would to a great extent be rendered illusory by reason of legal limitations on the legislative power which were then for the first time seen to be far more extensive than had been supposed. The serious situation which

[1] The Act is reprinted as an Annex to this Report (*see page* 165).

thus developed in South Australia led to an examination of the whole question by the Law Officers of the Crown in England, whose opinion, while not affirming the extensive application of the doctrine of repugnancy upheld by the South Australian Court, found the test of repugnancy to be of so vague and general a kind as to leave great uncertainty in its application. They accordingly advised legislation to define the scope of the doctrine in new and precise terms. The Colonial Laws Validity Act, 1865, was enacted as the result of their advice.

48. The Act expressly conferred upon Colonial Legislatures the power of making laws even though repugnant to the English common law, but declared that a Colonial law repugnant to the provisions of an Act of the Parliament of the United Kingdom extending to the Colony either by express words or by necessary intendment should be void to the extent of such repugnancy. The Act also removed doubts which had arisen regarding the validity of laws assented to by the Governor of a Colony in a manner inconsistent with the terms of his Instructions.

49. The Act, at the time when it was passed, without doubt extended the then existing powers of Colonial Legislatures. This has always been recognised, but it is no less true that definite restrictions of a far-reaching character upon the effective exercise of those powers were maintained and given statutory effect. In important fields of legislation actually covered by statutes extending to the Dominions the restrictions upon legislative power have caused and continue to cause practical inconvenience by preventing the enactment of legislation adapted to their special needs. The restrictions in the past served a useful purpose in securing uniformity of law and co-operation on various matters of importance: but it follows from the Report of the Imperial Conference of 1926 that this method of securing uniformity, based as it was upon the supremacy of the Parliament of the United Kingdom, is no longer constitutionally appropriate in the case of the Dominions, and the next step is to bring the legal position into accord with the constitutional. Moreover, the interpretation of the Act has given rise to difficulties in practice, especially in Australia, because it is not always possible to be certain whether a particular Act does or does not extend by necessary intendment to a Dominion, and, if it does, whether all or any of the provisions of a particular Dominion law are or are not repugnant to it.

GENERAL RECOMMENDATIONS

50. We have therefore proceeded on the basis that effect can only be given to the principles laid down in the Report of 1926 by repealing the Colonial Laws Validity Act, 1865, in its application to laws made by the Parliament of a Dominion, and the

discussions at the Conference were mainly concerned with the manner in which this should be done. Our recommendation is that legislation be enacted declaring in terms that the Act should no longer apply to the laws passed by any Dominion.

51. We think it necessary, however, that there should also be a substantive enactment declaring the powers of the Parliament of a Dominion, lest a simple repeal of the Colonial Laws Validity Act might be held to have restored the old common law doctrine.

52. It may be stated in this connection that, having regard to the nature of the relations between the several members of the British Commonwealth and the constitutional position of the Governor-General of a Dominion, it has not been considered necessary to make any express provision for the possibility, contemplated in Section 4 of the Colonial Laws Validity Act, of colonial laws assented to by the Governor being held void because of any instructions with reference to such laws or the subjects thereof contained in the Letters Patent or Instrument authorising the Governor to assent to laws for the peace, order, or good government of the Colony.

53. We recommend that effect be given to the proposals in the foregoing paragraphs, by means of clauses in the following form :—

> (1) *The Colonial Laws Validity Act*, 1865, *shall cease to apply to any law made by the Parliament of a Dominion.*
>
> (2) *No law and no provision of any law hereafter made by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England or to the provisions of any existing or future Act of Parliament or to any order, rule or regulation made thereunder, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation in so far as the same is part of the law of the Dominion.*

54. With regard lastly to the problem which arises from the existence of a legal power in the Parliament of the United Kingdom to legislate for the Dominions, we consider that the appropriate method of reconciling the existence of this power with the established constitutional position is to place on record a statement embodying the conventional usage. We therefore recommend that a statement in the following terms should be placed on record in the proceedings of the next Imperial Conference :—

> "*It would be in accord with the established constitutional position of all members of the Commonwealth in relation to one another that no law hereafter made by the Parliament of the United Kingdom shall extend to any Dominion otherwise than at the request and with the consent of that Dominion.*"

We further recommend that this constitutional convention itself should appear as a formal recital or preamble in the proposed Act of the Parliament of the United Kingdom.

55. Practical considerations affecting both the drafting of Bills and the interpretation of Statutes make it desirable that this principle should also be expressed in the enacting part of the Act, and we accordingly recommend that the proposed Act should contain a declaration and enactment in the following terms :—

> *" Be it therefore declared and enacted that no Act of Parliament hereafter made shall extend or be deemed to extend to a Dominion unless it is expressly declared therein that that Dominion has requested and consented to the enactment thereof."*

56. The association of constitutional conventions with law has long been familiar in the history of the British Commonwealth ; it has been characteristic of political development both in the domestic government of these communities and in their relations with each other ; it has permeated both executive and legislative power. It has provided a means of harmonising relations where a purely legal solution of practical problems was impossible, would have impaired free development, or would have failed to catch the spirit which gives life to institutions. Such conventions take their place among the constitutional principles and doctrines which are in practice regarded as binding and sacred whatever the powers of Parliaments may in theory be.

57. If the above recommendations are adopted, the acquisition by the Parliaments of the Dominions of full legislative powers will follow as a necessary consequence. We then proceeded to consider whether in these circumstances special provision ought to be made with regard to certain subjects. These seemed to us to fall into two categories, namely, those in which uniform or reciprocal action may be necessary or desirable for the purpose of facilitating free co-operation among the members of the British Commonwealth in matters of common concern, and those in which peculiar and in some cases temporary conditions in some of the Dominions call for special treatment.

58. By the removal of all such restrictions upon the legislative powers of the Parliaments of the Dominions and the consequent effective recognition of the equality of these Parliaments with the Parliament of the United Kingdom, the law will be brought into harmony with the root principle of equality governing the free association of the members of the British Commonwealth of Nations.

59. As, however, these freely associated members are united by a common allegiance to the Crown, it is clear that the laws

relating to the succession to the Throne and the Royal Style and Titles are matters of equal concern to all.

60. We think that appropriate recognition would be given to this position by means of a convention similar to that which has in recent years controlled the theoretically unfettered powers of the Parliament of the United Kingdom to legislate upon these matters. Such a constitutional convention would be in accord with and would not derogate from and is not intended in any way to derogate from the principles stated by the Imperial Conference of 1926 as underlying the position and mutual relations of the members of the British Commonwealth of Nations. We therefore recommend that this convention should be formally put on record in the following terms:—

> *"In as much as the Crown is the symbol of the free association of the members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom."*

61. We recommend that the statement of principles set out in the three preceding paragraphs be placed on record in the proceedings of the next Imperial Conference, and that the constitutional convention itself in the form which we have suggested should appear as a formal recital or preamble in the proposed Act to be passed by the Parliament of the United Kingdom.

62. The second subject which we considered concerns the effect of the acquisition of full legislative powers by the Parliaments of the Dominions possessing federal Constitutions.

63. Canada alone among the Dominions has at present no power to amend its Constitution Act without legislation by the Parliament of the United Kingdom. The fact that no specific provision was made for effecting desired amendments wholly by Canadian agencies is easily understood, apart from the special conditions existing in Canada at that time, when it is recalled that the British North America Act, 1867, was the first Dominion federation measure and was passed over sixty years ago, at an early stage of development. It was pointed out that the question of alternative methods of amendment was a matter for future consideration by the appropriate Canadian authorities and that it was desirable therefore to make it clear that the proposed Act of the Parliament of the United Kingdom would effect no change in this respect. It was also pointed out that for a similar reason an express declaration was desirable that nothing in the

Act should authorise the Parliament of Canada to make laws on any matter at present within the authority of the Provinces, not being a matter within the authority of the Dominion.

64. The Commonwealth of Australia was established under, and its Constitution is contained in, an Act of Parliament of the United Kingdom, the Commonwealth of Australia Constitution Act, 1900. The authority of the Constitution, with its distribution of powers between Commonwealth and States, originated in the first instance from the supremacy of Imperial legislation; and it was pointed out that the continued authority of the Constitution is essential to the maintenance of the federal system. The Constitution of the Commonwealth, though paramount law for the Parliament of the Commonwealth, is subject to alteration by the joint action of Parliament and the Electorate. To that extent the Commonwealth need not have recourse to any authority external to itself for alterations of its instrument of government. But "the Constitution," though the main part, is not the whole of the Commonwealth of Australia Constitution Act; and the eight sections of that which precede the section containing "the Constitution" can be altered only by an Act of the Parliament of the United Kingdom. It will be for the proper authorities in Australia in due course to consider whether they desire this position to remain and, if not, how they propose to provide for the matter.

65. The Constitution of New Zealand is to a very considerable extent alterable by the Parliament of New Zealand; but the powers of alteration conferred by the Constitution are subject to certain qualifications, and it is apparently a matter of doubt whether these qualifications have been removed by Section 5 of the Colonial Laws Validity Act. It appears to us that any recommendations in relation to the Constitution of the Dominion of Canada and the Commonwealth of Australia should also be applied to New Zealand; and it will then be for the appropriate authorities in New Zealand to consider whether, and, if so, in what form, the full power of alteration should be given.

66. We are accordingly of opinion that the inclusion is required in the proposed Act of the Parliament of the United Kingdom of express provisions dealing with the matters discussed in the three preceding paragraphs, and we have prepared the following clauses:—

(1) *Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution Acts of the Dominion of Canada, the Commonwealth of Australia, and the Dominion of New Zealand, otherwise than in accordance with the law and constitutional usage and practice heretofore existing.*

(2) *Nothing in this Act shall be deemed to authorise the*

Parliaments of the Dominion of Canada and the Commonwealth of Australia to make laws on any matter at present within the authority of the Provinces of Canada or the States of Australia, as the case may be, not being a matter within the authority of the Parliaments or Governments of the Dominion of Canada and of the Commonwealth of Australia respectively.

67. Similar considerations do not arise in connection with the Constitutions of the Union of South Africa and the Irish Free State. The Constitutions of both countries are framed on the unitary principle. Both include complete legal powers of constitutional amendment. In the case of the Union of South Africa the exercise of these powers is conditioned only by the provisions of Section 152 of the South Africa Act, 1909. In the case of the Irish Free State they are exercised in accordance with the obligations undertaken by the Articles of Agreement for a Treaty signed at London on the 6th day of December, 1921.

68. The Report of 1926 dealt only with the constitutional position of the Governments and Parliaments of the Dominions. In recommending the setting up of the present Conference it did not make any specific mention of the special problems presented by federal Constitutions, and accordingly the present Conference has not been called on to consider any matters relating to the legislative powers of the Provincial Legislatures in Canada or the State Legislatures in Australia. The federal character of the Constitutions of Canada and Australia, however, gives rise to questions which we have not found it possible to leave out of account, inasmuch as they concern self-government in those Dominions.

69. The Constitution of Australia presents a special problem in respect to extra-territorial legislative power. The most urgently required field of extra-territorial power is criminal law, which, in general, is within the State power in Australia. In Australia the Parliaments of the States are not subject to any specific territorial restrictions; they differ from the Commonwealth Parliament only in this, that their laws have not the extended operation specifically given to the laws of the Commonwealth Parliament by Section 5 of the Commonwealth of Australia Constitution Act, and that the Commonwealth Parliament has power over certain specific matters which look beyond the territory of the Commonwealth. The question whether the power of enacting extra-territorial laws over matters within its sphere, to be enjoyed by the Commonwealth Parliament in common with the Parliaments of other Dominions, should be granted also to State Parliaments is a matter primarily for consideration by the proper authorities in Australia.

70. The Australian Constitution also presents special problems in relation to disallowance and reservation. In Australia there is direct contact between the States and His Majesty's Government in the United Kingdom in respect of disallowance and reservation of State legislation. This position will not be affected by the report of the present Conference.

71. The question of the effect of repugnance of Provincial or State legislation to Acts of the Parliament of the United Kingdom presents the same problems in Canada and in Australia. The recommendations which we have made with regard to the Colonial Laws Validity Act do not deal with the problems of Provincial or State legislation. In the absence of special provision, Provincial and State legislation will continue to be subject to the Colonial Laws Validity Act and to the legislative supremacy of the Parliament of the United Kingdom, and it will be a matter for the proper authorities in Canada and in Australia to consider whether and to what extent it is desired that the principles to be embodied in the new Act of the Parliament of the United Kingdom should be applied to Provincial and State legislation in the future.

72. We pass now to the subject of nationality, which is clearly a matter of equal interest to all parts of the Commonwealth.

73. Nationality is a term with varying connotations. In one sense it is used to indicate a common consciousness based upon race, language, traditions, or other analogous ties and interests and is not necessarily limited to the geographic bounds of any particular State. Nationality in this sense has long existed in the older parent communities of the Commonwealth. In another and more technical sense it implies a definite connection with a definite State and Government. The use of the term in the latter sense has in the case of the British Commonwealth been attended by some ambiguity, due in part to its use for the purpose of denoting also the concept of allegiance to the Sovereign. With the constitutional development of the communities now forming the British Commonwealth of Nations the terms "national," "nationhood," and "nationality," in connection with each member, have come into common use.

74. The status of the Dominions in international relations, the fact that the King, on the advice of his several Governments, assumes obligations and acquires rights by treaty on behalf of individual members of the Commonwealth, and the position of the members of the Commonwealth in the League of Nations, and in relation to the Permanent Court of International Justice, do not merely involve the recognition of these communities as distinct juristic entities, but also compel recognition of a particular status of membership of those communities for legal and political purposes. These exigencies have already become apparent; and two of the Dominions have passed Acts defin-

ing their "nationals" both for national and for international purposes.

75. The members of the Commonwealth are united by a common allegiance to the Crown. This allegiance is the basis of the common status possessed by all subjects of His Majesty.

76. A common status directly recognised throughout the British Commonwealth in recent years has been given a statutory basis through the operation of the British Nationality and Status of Aliens Act, 1914.

77. Under the new position, if any change is made in the requirements established by the existing legislation, reciprocal action will be necessary to attain this same recognition the importance of which is manifest in view of the desirability of facilitating freedom of intercourse and the mutual granting of privileges among the different parts of the Commonwealth.

78. It is of course plain that no member of the Commonwealth either could or would contemplate seeking to confer on any person a status to be operative throughout the Commonwealth save in pursuance of legislation based upon common agreement, and it is fully recognised that this common status is in no way inconsistent with the recognition within and without the Commonwealth of the distinct nationality possessed by the nationals of the individual states of the British Commonwealth.

79. But the practical working out and application of the above principles will not be an easy task nor is it one which we can attempt to enter upon in this Report. We recommend, however, that steps should be taken as soon as possible by consultation among the various Governments to arrive at a settlement of the problems involved on the basis of these principles.

80. There are a number of subjects in which uniformity has hitherto been secured through the medium of Acts of the Parliament of the United Kingdom of general application. Where uniformity is desirable on the ground of common concern or practical convenience we think that this end should in the future be sought by means of concurrent or reciprocal action based upon agreement. We recommend that uniformity of the law of prize and co-ordination of prize jurisdiction should agreeably with the above principle be maintained. With regard to such subjects as fugitive offenders, foreign enlistment and extradition in certain of its aspects, we recommend that before any alteration is made in the existing law there should be prior consultation and, so far as possible, agreement.

81. Our attention has been drawn to the definition of the word "Colony" in Section 18 of the Interpretation Act, 1889, and we suggest that the opportunity should be taken of the proposed Act to be passed by the Parliament of the United

Kingdom to amend this definition. We have accordingly prepared the following clause :—

> *In this Act and in every Act passed after the commencement of this Act the expression "Dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and the Irish Free State or any of them, and the expression "Colony" shall, notwithstanding anything in the Interpretation Act, 1889, not include a Dominion or any Province or State forming part of a Dominion.*

82. In making the recommendations contained in this part of our Report, we have proceeded on the assumption that the necessary legislation and the constitutional conventions to which we have referred will in due course receive the approval of the Parliaments of the Dominions concerned.

PART VI.—MERCHANT SHIPPING LEGISLATION AND COLONIAL COURTS OF ADMIRALTY ACT, 1890

(*Paragraphs* 83 *to* 124 *are not relevant here.*)

PART VII.—SUGGESTED TRIBUNAL FOR THE DETERMINATION OF DISPUTES

125. We felt that our work would not be complete unless we gave some consideration to the question of the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth. We were impressed with the advantages which might accrue from the establishment of such a tribunal. It was clearly impossible in the time at our disposal to do more than collate various suggestions with regard first to the constitution of such a tribunal, and, secondly, to the jurisdiction which it might exercise. With regard to the former, the prevailing view was that any such tribunal should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth. With regard to the latter, there was general agreement that the jurisdiction should be limited to justiciable issues arising between governments. We recommend that the whole subject should be further examined by all the governments.

PART VIII.—CONCLUSION

126. It will, we trust, be apparent from the recommendations of our Report that we have endeavoured to carry out the principles laid down by the Imperial Conference of 1926. The recommendations submitted have been framed with the object of

carrying into full effect the equality of status established as the root-principle governing the relations of the members of the Commonwealth, and indicating methods for maintaining and strengthening the practical system of free co-operation which is its instrument.

(*Paragraphs* 127 *and* 128 *are not relevant here.*)

ANNEX.

COLONIAL LAWS VALIDITY ACT, 1865.
(28 & 29 Vic. c. 63.)

An Act to remove Doubts as to the Validity of Colonial Laws.

[29th *June*, 1865.]

Whereas Doubts have been entertained respecting the Validity of divers Laws enacted or purporting to have been enacted by the Legislatures of certain of Her Majesty's Colonies, and respecting the Powers of such Legislatures, and it is expedient that such Doubts should be removed:

Be it hereby enacted by the Queen's most Excellent Majesty, by and with the Advice and Consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the Authority of the same, as follows:—

Definitions: "Colony:"

(1) The Term "Colony" shall in this Act include all of Her Majesty's Possessions abroad in which there shall exist a Legislature, as hereinafter defined, except the Channel Islands, the *Isle of Man*, and such Territories as may for the Time being be vested in Her Majesty under or by virtue of any Act of Parliament for the Government of *India*:

"Legislature." "Colonial Legislature:"

The Terms "Legislature" and "Colonial Legislature" shall severally signify the Authority, other than the Imperial Parliament or Her Majesty in Council, competent to make Laws for any Colony:

"Representative Legislature:"

The Term "Representative Legislature" shall signify any Colonial Legislature which shall comprise a Legislative Body of which One Half are elected by inhabitants of the Colony:

"Colonial Law:"

The Term "Colonial Law" shall include Laws made for any Colony either by such Legislature as aforesaid or by Her Majesty in Council:

Act of Parliament, &c. to extend to Colony when made applicable to such Colony: "Governor:"

An Act of Parliament, or any Provision thereof, shall, in construing this Act, be said to extend to any Colony when it is made applicable to such Colony by the express Words or necessary Intendment of any Act of Parliament:

The Term "Governor" shall mean the Officer lawfully administering the Government of any Colony:

"Letters Patent."

The Term "Letters Patent" shall mean Letters Patent under the Great Seal of the United Kingdom of *Great Britain* and *Ireland*.

Colonial Law when void for Repugnancy.

(2) Any Colonial Law which is or shall be in any respect repugnant to the Provisions of any Act of Parliament extending to the Colony to which such Law may relate, or repugnant to any Order or Regulation made under Authority of such Act of Parliament, or having in the Colony the Force and Effect of such Act, shall be read subject to such Act, Order, or Regulation, and shall, to the Extent of such Repugnancy, but not otherwise, be and remain absolutely void and inoperative.

Colonial Law when not void for Repugnancy.

(3) No Colonial Law shall be or be deemed to have been void or inoperative on the Ground of Repugnancy to the Law of *England*, unless the same shall be repugnant to the Provisions of some such Act of Parliament, Order or Regulation as aforesaid.

Colonial Law not void for Inconsistency with Instructions.

(4) No Colonial Law, passed with the Concurrence of or assented to by the Governor of any Colony, or to be hereafter so passed or assented to, shall be or be deemed to have been void or inoperative by reason only of any Instructions with reference to such Law or the Subject thereof which may have been given to such Governor by or on behalf of Her Majesty, by any Instrument other than the Letters Patent or Instrument authorising such Governor to concur in passing or to assent to Laws for the Peace, Order, and good Government of such Colony, even though such Instructions may be referred to in such Letters Patent or last-mentioned Instrument.

Colonial Legislature may establish, &c. Courts of Law.

(5) Every Colonial Legislature shall have, and be deemed at all Times to have had, full Power within its Jurisdiction to establish Courts of Judicature, and to abolish and reconstitute the same, and to alter the Constitution thereof, and to make Provision for the

Administration of Justice therein; and every Representative Legislature shall, in respect to the Colony under its jurisdiction, have, and be deemed at all Times to have had, full Power to make Laws respecting the Constitution, Powers, and Procedure of such Legislature; provided that such Laws shall have been passed in such Manner and Form as may from Time to Time be required by any Act of Parliament, Letters Patent, Order in Council, or Colonial Law for the Time being in force in the said Colony.

Representative Legislature may alter Constitution.

(6) The Certificate of the Clerk or other proper Officer of a Legislative Body in any Colony to the Effect that the Document to which it is attached is a true Copy of any Colonial Law assented to by the Governor of such Colony, or of any Bill reserved for the Signification of Her Majesty's Pleasure by the said Governor, shall be *primâ facie* Evidence that the Document so certified is a true Copy of such Law or Bill, and, as the Case may be, that such Law has been duly and properly passed and assented to, or that such Bill has been duly and properly passed and presented to the Governor; and any Proclamation purporting to be published by Authority of the Governor in any Newspaper in the Colony to which such Law or Bill shall relate, and signifying Her Majesty's Disallowance of any such Colonial Law or Her Majesty's Assent to any such reserved Bill as aforesaid, shall be *primâ facie* Evidence of such Disallowance or Assent.

Certified Copies of Laws to be Evidence that they are properly passed. Proclamation to be Evidence of Assent and Disallowance.

And whereas Doubts are entertained respecting the Validity of certain Acts enacted or reputed to be enacted by the Legislature of *South Australia*: Be it further enacted as follows:

(7) All Laws or reputed Laws enacted or purporting to have been enacted by the said Legislature, or by Persons or Bodies of Persons for the Time being acting as such Legislature, which have received the Assent of Her Majesty in Council, or which have received the Assent of the Governor of the said Colony in the Name and on behalf of Her Majesty, shall be and be deemed to have been valid and effectual from the Date of such Assent for all Purposes whatever; provided that nothing herein contained shall be deemed to give Effect to any Law or reputed Law which has been disallowed by Her Majesty, or has expired, or has been lawfully repealed, or to prevent the lawful Disallowance or Repeal of any Law.

Certain Acts enacted by Legislature of South Australia to be valid.

APPENDIX III

EXTRACTS FROM THE REPORT OF THE IMPERIAL CONFERENCE, 1930

(Cmd. 3717)

VI.—Inter-Imperial Relations

It was found convenient, after preliminary discussion by the Heads of Delegations on the various points involved, to refer many of the questions on the Agenda affecting Inter-Imperial Relations to a Committee under the chairmanship of The Right Honourable Lord Sankey, G.B.E., Lord Chancellor. This Committee did most valuable work in exploring the various issues and the following section is based largely on its work. Lord Sankey's Committee was, in turn, aided by special Sub-Committees that were set up to deal with particular aspects of the questions involved and by a drafting Sub-Committee under the chairmanship of Sir Robert Garran, K.C.M.G., Solicitor-General, Commonwealth of Australia.

(*a*) *Report of the Conference of* 1929 *on the Operation of Dominion Legislation.*

The Imperial Conference examined the various questions arising with regard to the Report of the Conference on the Operation of Dominion Legislation and in particular took into consideration the difficulties which were explained by the Prime Minister of Canada regarding the representations which had been received by him from the Canadian Provinces in relation to that Report.

A special question arose in respect to the application to Canada of the sections of the Statute proposed to be passed by the Parliament at Westminster (which it was thought might conveniently be called the Statute of Westminster), relating to the Colonial Laws Validity Act and other matters. On the one hand it appeared that approval had been given to the Report of the Conference on the Operation of Dominion Legislation by resolution of the House of Commons of Canada, and accordingly, that the Canadian representatives felt themselves bound not to take any action which might properly be construed as a departure from the spirit of that resolution. On the other hand, it appeared that representations had been received from certain of the

Provinces of Canada subsequent to the passing of the resolution; protesting against action on the Report until an opportunity had been given to the Provinces to determine whether their rights would be adversely affected by such action.

Accordingly, it appeared necessary to provide for two things. In the first place it was necessary to provide an opportunity for His Majesty's Government in Canada to take such action as might be appropriate to enable the Provinces to present their views. In the second place it was necessary to provide for the extension of the sections of the proposed Statute to Canada or for the exclusion of Canada from their operation after the Provinces had been consulted. To this end it seemed desirable to place on record the view that the sections of the Statute relating to the Colonial Laws Validity Act should be so drafted as not to extend to Canada unless the Statute was enacted in response to such requests as are appropriate to an amendment of the British North America Act. It also seemed desirable to place on record the view that the sections should not subsequently be extended to Canada except by an Act of the Parliament of the United Kingdom enacted in response to such requests as are appropriate to an amendment of the British North America Act.

The Conference on the Operation of Dominion Legislation in 1929, recommended a draft clause for inclusion in the Statute proposed to be passed by the Parliament at Westminster to the following effect :—

> "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

At the present Conference the delegates of His Majesty's Government in the United Kingdom were apprehensive lest a clause in this form should have the effect of preventing an Act of the United Kingdom Parliament passed hereafter from having the operation which the legislation of one State normally has in relation to the territory of another. To obviate this, the following amendment was proposed :—

> "No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend, or be deemed to extend, to a Dominion *as part of the law in force in that Dominion*, unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof."

The Delegates from some of the Dominions were apprehensive lest the acceptance of the above amendment might imply the recognition of a right of the Parliament of the United Kingdom

to legislate in relation to a Dominion (otherwise than at the request and with the consent of the Dominion) in a manner which, if the legislation had been enacted in relation to a foreign state, would be inconsistent with the principles of international comity. It was agreed that the clause as amended did not imply, and was not to be construed as implying, the recognition of any such right, and, on the proposal of the United Kingdom Delegates, that a statement to this effect should be placed on record.

The Conference passed the following Resolutions :—

(i) The Conference approves the Report of the Conference on the Operation of Dominion Legislation [1] (which is to be regarded as forming part of the Report of the present Conference), subject to the conclusions embodied in this Section.

(ii) The Conference recommends :—

(*a*) that the Statute proposed to be passed by the Parliament at Westminster should contain the provisions set out in the Schedule annexed.

(*b*) that the 1st December, 1931, should be the date as from which the proposed Statute should become operative.

(*c*) that with a view to the realisation of this arrangement, Resolutions passed by both Houses of the Dominion Parliaments should be forwarded to the United Kingdom, if possible by 1st July, 1931, and, in any case, not later than the 1st August, 1931, with a view to the enactment by the Parliament of the United Kingdom of legislation on the lines set out in the schedule annexed.

(*d*) that the Statute should contain such further provisions as to its application to any particular Dominion as are requested by that Dominion.

SCHEDULE.

CLAUSES IN PROPOSED LEGISLATION.

1. In accordance with the recommendation in paragraph 43 of the Report of the Conference on the Operation of Dominion Legislation, a clause as follows :—

It is hereby declared and enacted that the Parliament of a Dominion has full power to make laws having extra-territorial operation.

2. In accordance with the recommendation in paragraph 53 a clause as follows :—

[1] Cmd. 3479.

(1) *The Colonial Laws Validity Act*, 1865, *shall not apply to any law made after the commencement of this Act by the Parliament of a Dominion.*

(2) *No law and no provision of any law made after the commencement of this Act by the Parliament of a Dominion shall be void or inoperative on the ground that it is repugnant to the law of England, or to the provisions of any existing or future Act of Parliament of the United Kingdom, or to any order, rule or regulation made under any such Act, and the powers of the Parliament of a Dominion shall include the power to repeal or amend any such Act, order, rule or regulation, in so far as the same is part of the law of the Dominion.*

3. In accordance with the recommendation in paragraph 55 a clause as follows:—

No Act of Parliament of the United Kingdom passed after the commencement of this Act shall extend or be deemed to extend to a Dominion as part of the law in force in that Dominion unless it is expressly declared in that Act that that Dominion has requested, and consented to, the enactment thereof.

4. In accordance with the recommendations in paragraph 66 clauses as follows:—

Nothing in this Act shall be deemed to confer any power to repeal or alter the Constitution or the Constitution Act of the Commonwealth of Australia or the Constitution Act of the Dominion of New Zealand otherwise than in accordance with the law existing before the commencement of this Act.

Nothing in this Act shall be deemed to authorise the Parliament of the Commonwealth of Australia to make laws on any matter within the authority of the States of Australia, not being a matter within the authority of the Parliament or Government of the Commonwealth of Australia.

. . . . . .

Note.—In view of the doubts that have arisen concerning the interpretation of the draft section in paragraph 66 in its application to the Canadian Constitution the words "Dominion of Canada" and "Provinces" have been deleted. It is intended that a section dealing exclusively with the Canadian position will be inserted after the representations of the Provinces have received consideration.

5. In accordance with the recommendation in paragraph 81 a clause as follows:—

Notwithstanding anything in the Interpretation Act, 1889, the expression "Colony" shall not, in any Act of the Parliament of the United Kingdom passed after the commencement of this Act, include a Dominion or any Province or State forming part of a Dominion.

6. In accordance with the recommendations in paragraph 123 clauses as follows:—

Without prejudice to the generality of the foregoing provisions of this Act sections seven hundred and thirty-five and seven hundred and thirty-six of the Merchant Shipping Act, 1894, shall be construed as though reference therein to the Legislature of a British possession did not include reference to the Parliament of a Dominion.

. . . . . .

Without prejudice to the generality of the foregoing provisions of this Act section four of the Colonial Courts of Admiralty Act, 1890 (which requires certain laws to be reserved for the signification of His Majesty's pleasure or to contain a suspending clause), and so much of section seven of that Act as requires the approval of His Majesty in Council to any rules of Court for regulating the practice and procedure of a Colonial Court of Admiralty, shall cease to have effect in any Dominion as from the commencement of this Act.

7. A clause to deal with the position of New Zealand as follows:—

No provision of this Act shall extend to the Dominion of New Zealand as part of the law thereof unless that provision is adopted by the Parliament of that Dominion, and any Act of the said Parliament adopting any provision of this Act may provide that the adoption shall have effect either as from the commencement of this Act or as from such later date as may be specified by the adopting Act.

CERTAIN RECITALS IN PROPOSED LEGISLATION.

1. In accordance with the recommendation of paragraph 54, a recital as follows:—

And whereas it is in accord with the established constitutional position that no law hereafter made by the Parliament of the United Kingdom shall extend to any of the Dominions as part of the law in force in that Dominion otherwise than at the request and with the consent of that Dominion.

2. In accordance with the recommendation in paragraph 60, a recital as follows :—

And whereas it is meet and proper to set out by way of preamble to this Act, that inasmuch as the Crown is the symbol of the free association of the Members of the British Commonwealth of Nations, and as they are united by a common allegiance to the Crown, it would be in accord with the established constitutional position of all the Members of the Commonwealth in relation to one another that any alteration in the law touching the Succession to the Throne or the Royal Style and Titles shall hereafter require the assent as well of the Parliaments of all the Dominions as of the Parliament of the United Kingdom.

(*b*) *Nationality.*
(*Not relevant.*)

(*c*) *Nationality of Married Women.*
(*Not relevant.*)

(*d*) *Commonwealth Tribunal.*

The Report of the Conference on the Operation of Dominion Legislation contains the following paragraph (paragraph 125) :—

" We felt that our work would not be complete unless we gave some consideration to the question of the establishment of a tribunal as a means of determining differences and disputes between members of the British Commonwealth. We were impressed with the advantages which might accrue from the establishment of such a tribunal. It was clearly impossible in the time at our disposal to do more than collate various suggestions with regard first to the constitution of such a tribunal, and secondly, to the jurisdiction which it might exercise. With regard to the former, the prevailing view was that any such tribunal should take the form of an *ad hoc* body selected from standing panels nominated by the several members of the British Commonwealth. With regard to the latter, there was general agreement that the jurisdiction should be limited to justiciable issues arising between governments. We recommend that the whole subject should be further examined by all the governments."

This matter was examined by the Conference and they found themselves able to make certain definite recommendations with regard to it.

Some machinery for the solution of disputes which may arise between the Members of the British Commonwealth is desirable. Different methods for providing this machinery were explored and it was agreed, in order to avoid too much rigidity, not to recommend the constitution of a permanent court, but to seek a solution along the line of *ad hoc* arbitration proceedings. The Conference thought that this method might be more fruitful than any other in securing the confidence of the Commonwealth.

The next question considered was whether arbitration proceedings should be voluntary or obligatory, in the sense that one party would be under an obligation to submit thereto if the other party wished it. In the absence of general consent to an obligatory system it was decided to recommend the adoption of a voluntary system.

It was agreed that it was advisable to go further, and to make recommendations as to the competence and the composition of an arbitral tribunal, in order to facilitate resort to it, by providing for the machinery whereby a tribunal could, in any given case, be brought into existence.

As to the competence of the tribunal, no doubt was entertained that this should be limited to differences between governments. The Conference was also of opinion that the differences should only be such as are justiciable.

As to the composition of the tribunal it was agreed :—

(1) The Tribunal shall be constituted *ad hoc* in the case of each dispute to be settled.

(2) There shall be five members, one being the Chairman ; neither the Chairman nor the members of the Tribunal shall be drawn from outside the British Commonwealth of Nations.

(3) The members, other than the Chairman, shall be selected as follows :—

(*a*) One by each party to the dispute from States Members of the Commonwealth other than the parties to the dispute, being persons who hold or have held high judicial office or are distinguished jurists and whose names will carry weight throughout the Commonwealth.

(*b*) One by each party to the dispute from any part of the Commonwealth, with complete freedom of choice.

(4) The members so chosen by each party shall select another person as Chairman of the Tribunal as to whom they shall have complete freedom of choice.

(5) If the parties to the dispute so desire, the Tribunal shall be assisted by the admission as assessors of persons with special knowledge and experience in regard to the case to be brought before the Tribunal.

It was thought that the expenses of the tribunal itself in any given case should be borne equally by the parties, but that each party should bear the expense of presenting its own case.

It was felt that details as to which agreement might be necessary might be left for arrangement by the governments concerned.

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